IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-372

AMERICAN TELEPHONE AND TELEGRAPH COMPANY; WESTERN ELECTRIC COMPANY, INC.; and BELL TELEPHONE LABORATORIES, INC., *Petitioners*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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September 8, 1977

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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Petitioners pray that a writ of certiorari be issued under 28 U.S.C. § 1254(1) to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this cause on May 26, 1977, which denied a petition for a writ of certiorari under 28 U.S.C. § 1651 to review two orders entered by the United States District Court for the District of Columbia (Judge Joseph C. Waddy, presiding) on November 24, 1976, and December 22, 1976. Petitioners also pray that a writ of certiorari be issued under

28 U.S.C. § 1651 to review directly the aforementioned orders of the district court.

OPINIONS BELOW

The judgment of the Court of Appeals dated May 26, 1977, which is not reported, is annexed hereto as Appendix A. The order of the district court dated November 24, 1976, reported at 427 F. Supp. 57, is annexed hereto as Appendix B. The order of the district court dated December 22, 1976, which is not reported, is annexed hereto as Appendix C.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) and 28 U.S.C. § 1651. The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on May 26, 1977. A timely petition for rehearing was filed and denied on July 7, 1977. The jurisdiction of this Court to issue a writ of certiorari under 28 U.S.C. § 1254(1) to review the judgment of the court of appeals is established by the following decisions of this Court:

Schlagenhauf v. *Holder,* 379 U.S. 104 (1964);

Kerr v. *United States District Court for the Northern District of California,* 426 U.S. 394 (1976).

The orders of the district court were entered on November 24, 1976, and December 22, 1976, respectively. By virtue of the provisions of the Expediting Act of February 11, 1903 (32 Stat. 823, as amended, 15 U.S.C. § 29), these orders are not reviewable by appeal. Petitioners initially sought review of these orders both directly in this Court and in the United States Court of Appeals for the District of Columbia Circuit by petitions for writ of certiorari filed under 28 U.S.C. § 1651. The petition filed in this Court was denied on January 25, 1977, and the petition filed in the court of appeals was denied on May 26, 1977. The relief sought by the present petition for certiorari in this Court is therefore not available in any other court. The jurisdiction of this Court to issue a writ of certiorari under 28 U.S.C. § 1651 to review the orders of the district court is established by the following decisions of this Court:

United States Alkali Export Association, Inc. v. *United States,* 325 U.S. 196 (1945);

Far East Conference v. *United States,* 342 U.S. 570 (1952).

QUESTIONS PRESENTED

1. Whether, since the record in this case is entirely adequate to permit immediate resolution of a fundamental jurisdictional issue which may be dispositive of this entire litigation, a definitive resolution of that issue, prior to discovery and trial in the case, is required by the enormous burdens of the litigation to the parties, to the courts, to the regulatory process, to numerous non-parties, and to the public and by the need for such a resolution in order to permit proper judicial control over the further conduct of this case if it is to proceed at all?

2. Whether a district court may properly assert jurisdiction over an antitrust complaint charging monopolization of and conspiracy and attempt to monopolize alleged markets for telecommunica-

tions services and equipment where the defendants participate in the markets alleged solely as a pervasively regulated common carrier enterprise under Title II of the Communications Act of 1934 and comparable state regulatory statutes, where the basic structure of the industry involved has either directly resulted from, or has been accepted as the basis for, those regulatory statutes, and where virtually all of the conduct relied upon in support of that complaint is inextricably intertwined with defendants' discharge of their common carrier responsibilities subject to pervasive regulation?

3. Whether, even assuming that there may be some peripheral conduct encompassed within a complaint over which antitrust jurisdiction could properly be asserted, a district court may properly assert jurisdiction over an entire complaint on the basis of its belief that it has jurisdiction over that peripheral conduct, without analyzing the regulatory scheme involved or determining which of the conduct embodied within the complaint properly lies within its jurisdiction and which does not?

STATUTORY PROVISIONS INVOLVED

The pertinent portions of the Sherman Act (26 Stat. 209, as amended, 15 U.S.C. § 1 *et seq.*), the Communications Act of 1934 (48 Stat. 1064, as amended, 47 U.S.C. § 151 *et seq.*), and the All Writs Act (62 Stat. 944, as amended, 28 U.S.C. § 1651) are set forth in Appendix D to this petition. The principal regulatory statutes of the States in which the Bell System provides common carrier telecommunications services are also involved. Citations to these statutes are also set out in Appendix D.

STATEMENT

The business of providing common carrier telecommunications service in this country has for many decades been conducted pursuant to state and federal statutes which require coordination among the companies providing such services to establish a single unified nationwide telecommunications network and preclude any effective competition among such companies. Pursuant to this statutory scheme, the nationwide telecommunications network developed essentially as a single entity, with the Bell System companies and some 1600 independent telephone companies operating as a partnership to provide a complete end-to-end telecommunications service—that is, both switched message service (ordinary local and long distance calls), private line service and all of the equipment necessary to such service—between all points in the continental United States.

Under this partnership arrangement, the Bell System, as by far the largest single enterprise in the industry, accepted the responsibility for the design, operation and management of the nationwide telecommunications network so as to assure that it provides telecommunications service in the least costly, most reliable and most efficient manner. In order to discharge this responsibility, the Bell System established the Long Lines Department of AT&T to provide a core network of intercity facilities to connect local operating company facilities and to manage the operation of the nationwide network. It developed and maintained Western Electric, a manufacturing company acquired in 1882, as the preeminent developer and manufacturer of telecommunications equipment in the world. And in 1925, it established Bell Telephone Lab-

oratories, which has become the preeminent research and development facility for telecommunications.

Through Long Lines, Western Electric, Bell Labs and its telephone operating companies, the Bell System has discharged its statutory responsibilities in a manner that is unequalled, in telecommunications or, indeed, any industry that is a part of the basic infrastructure of this Nation's economy. Nonetheless, the Government in this case seeks to use the Sherman Act essentially to dismantle this entire structure. Proceeding from generalized charges of monopolization, conspiracy and attempt to monopolize, the Government challenges the whole basis for the development and structure of the industry. Because the Bell System has, through Long Lines, assumed the principal responsibility for connecting and managing the nationwide network, because Western Electric has manufactured, and the Bell System operating units have purchased from Western Electric, most of the telecommunications facilities and equipment they have needed to provide service, and because the Bell System has relied principally upon Bell Labs for research, development and systems engineering, the Government asks an antitrust court to break up the System by ordering a separation of some or all of the Bell System operating companies from some or all of the Long Lines Department of AT&T, a divestiture of Western Electric, and some unspecified disposition of Bell Labs.

At the same time, in an apparent effort to give some credence to a complaint that plainly is designed to repudiate the whole history of regulation in this industry, the Government attacks, as a violation of the antitrust laws, the positions which the Bell System has taken, the tariffs which it has filed, and the policies

which it has followed in respect of matters integrally related to the provision of common carrier telecommunications service—matters which have been, and by virtue of the statutory scheme under which the Bell System operates were required to be, considered and resolved in various regulatory proceedings before the Federal Communications Commission and comparable state regulatory agencies.

The Government's complaint, which was filed on November 20, 1974, is relatively straightforward. (For the convenience of the Court, the complaint is set out in full in Appendix E annexed hereto.) The complaint charges that "the defendants and co-conspirators have been engaged in an unlawful combination and conspiracy to monopolize, and the defendants have attempted to monopolize and have monopolized . . . interstate trade and commerce in telecommunications service and submarkets thereof, and telecommunications equipment, and submarkets thereof, . . ." (Complaint, ¶ 27). The "substantial terms" of this conspiracy are said to be that the Bell System will be maintained as a single entity (Complaint, ¶ 28(a)) and that competition from other common carriers, private telecommunications systems and equipment suppliers will be restricted or eliminated (Complaint, ¶ 28(b)-(e)). The complaint then specifies three separate kinds of allegedly unlawful conduct—(1) a refusal to sell terminal equipment to subscribers (¶ 29(f)), (2) obstructions of interconnection (¶ 29(a)-(e)), and (3) causing Western Electric to manufacture, and the Bell System to purchase from Western, substantially all of the System's equipment requirements (¶ 29(g)-(h))—in each of which petitioners are alleged to have engaged "pursuant to and in effectuation of the aforesaid combination and

conspiracy to monopolize, attempt to monopolize and monopolization" (Complaint, ¶ 29).

Because the terms of the combination and conspiracy alleged in the complaint relate exclusively to activities of the petitioners as a regulated telecommunications common carrier enterprise, and because every one of the specific charges alleged relates to such activities, petitioners included in their answer to the complaint challenges to the jurisdiction of the court over such charges under the Sherman Act and to the sufficiency of the complaint as filed to state a claim upon which relief could be granted. At the first hearing following the filing of petitioners' answer, the district court "indicated its concern over whether the jurisdictional defenses raised in the answer to the complaint were threshold matters which should be resolved before the expensive and protracted discovery inherent in the nature of this case was undertaken by the parties" (App. B, p. 3a). Based on that concern, the court *sua sponte* stayed all discovery and directed the parties to brief, among other things, the issue of whether the nature and scope of the regulation of the common carrier activities of the Bell System preclude the assertion of antitrust jurisdiction over the matters encompassed within the Government's complaint (Order dated February 24, 1975).

Throughout the proceedings which followed this order, petitioners have taken the position: (1) that the matters encompassed within the Government's complaint are subject to regulation by the FCC and state regulatory agencies pursuant to the Communications Act and comparable state regulatory statutes; (2) that these statutes establish a pervasive scheme of common carrier regulation which is repugnant to the applica-

tion of the antitrust laws to matters subject to that scheme; and (3) that the assertion of antitrust jurisdiction over a complaint based upon such matters is improper under a long line of decisions of this Court, including *Keogh* v. *Chicago & North Western R. Co.*, 260 U.S. 156 (1922); *Terminal Warehouse Co.* v. *Pennsylvania R. Co.*, 297 U.S. 500 (1936); *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296 (1963); *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363 (1973); *Gordon* v. *New York Stock Exchange, Inc.*, 422 U.S. 659 (1975); and *United States* v. *National Ass'n of Securities Dealers, Inc.*, 422 U.S. 694 (1975).

The Government initially attempted to meet petitioners' argument head on, arguing that under no circumstances could antitrust immunity be implied from regulation with respect to a charge under Section 2 of the Sherman Act like that involved here, since that charge involves "a continuing course of conduct" which must be examined as a whole regardless of the nature and extent of the regulation to which any of its constituent parts is subject. Thus, the Government argued that petitioners could be found guilty of violating Section 2 "if they have willfully and deliberately acquired or maintained monopoly power, regardless of whether their deliberate means and methods were legal or illegal, or approved, disapproved, or not examined by the Federal Communications Commission or any other regulatory agency" (U.S. Memo dated March 24, 1975, p. 29).

Subsequently, however, the Government began to retreat from this position, suggesting that even if the regulatory scheme applicable to telecommunications common carriers might justify a holding of antitrust

immunity with respect to matters subject to that scheme, the assertion of antitrust jurisdiction was proper in this case because, in its proof, the Government intended ultimately to rely upon some conduct that was not subject to the jurisdiction of regulatory agencies. Since no such conduct was specified in the complaint, most of the proceedings before the district court were taken up in efforts by the Government to convince the district court that its complaint encompassed conduct not subject to regulation [1] and in responses by petitioners showing with respect to each activity identified by the Government that the conduct involved was in fact subject to regulation.[2]

[1] The extremes to which the Government carried these efforts are demonstrated by its final memorandum submitted to the district court on November 1, 1976, in which it described 22 separate activities as "beyond the reach of the Communications Act," including the charge that "Bell Laboratories has . . . conducted economic research to provide theoretical defenses for defendants' structure" and "Bell Laboratories has . . . performed cost analyses of Western Electric equipment and AT&T services, developing new theories to support unreasonable low prices for equipment and services subject to competition" (U.S. Memo dated November 1, 1976, pp. 19-21). The plain implication of this argument was that because the Communications Act does not expressly empower the FCC to control the content of Bell Labs' theoretical economic research and cost analyses, the complaint could not be treated as related to matters wholly within its exclusive jurisdiction.

[2] The Government first broadened the conduct which it claimed to be encompassed within its complaint from the three specific charges identified in the complaint to 30 separate alleged activities (U.S. Memo dated March 24, 1975). (These alleged activities are set forth in Appendix F annexed hereto, as reflected in a memorandum as *amicus curiae* filed in the district court by the FCC). When petitioners showed that each one of these activities related to matters that are subject to regulatory jurisdiction (Def. Memo dated April 3, 1975), the Government responded with 22 additional alleged activities supposedly "beyond the reach of the Communications Act" (U.S. Memo dated November 1, 1976). In an exhibit filed and accepted in evidence by the district court at the hearing of November 16, 1976, petitioners showed that each one of these activities related to a matter that was subject to regulatory jurisdiction and identified numerous proceedings in which the matters involved actually were, or could have been had they been presented, considered and acted upon by regulatory agencies. (This exhibit is annexed hereto as Appendix G).

The Government's ultimate position in the district court was that the court could properly assert jurisdiction over the entire complaint if it found itself to have jurisdiction over any aspect of the complaint (U.S. Memo. dated April 3, 1975, pp. 1-2). Although petitioners strongly took issue with this position, pointing out that under the decisions of this Court set out above, the district court could not properly assert jurisdiction over the entirety of a complaint based principally upon matters immune from the antitrust laws merely by concluding that it has jurisdiction over a few peripheral charges (see also *Seatrain Lines, Inc.* v. *Pennsylvania R. Co.*, 207 F.2d 255 (3d Cir.), *cert. denied*, 345 U.S. 916 (1953)), the district court essentially adopted the Government's view. Thus, in a Memorandum, Opinion and Order dated November 24, 1976, the court held that it would proceed with the case because it "is satisfied that it has antitrust jurisdiction over at least some aspects of the case" (App. B, p. 9a).

The court's opinion did not specify the "aspects of the case" to which this holding referred, nor is there anything in the opinion which would permit the parties to identify those aspects. Instead, the court based its opinion entirely upon a generalized discussion of the principles it regarded as controlling with respect to issues of antitrust immunity arising from regulation. Thus, the district court's entire decision is based upon

its understanding—or, more accurately, its misunderstanding—of this Court's decisions in *Otter Tail Power* v. *United States,* 410 U.S. 366 (1973), and *United States* v. *Radio Corp. of America,* 358 U.S. 334 (1959)—two cases in which this Court upheld the assertion of antitrust jurisdiction because, *and only because,* a pervasive scheme of common carrier regulation was *not* applicable to the activities involved (410 U.S. at 373-74; 358 U.S. at 348-49). Despite the express limitation in those decisions, the district court relied upon *Otter Tail Power* and *RCA* to brush aside the cases involving pervasive common carrier regulation upon which petitioners had relied and did not even purport to examine the Government's complaint to determine whether it contained charges that were entitled to antitrust immunity.

Following the decision of the district court, petitioners sought immediate review of the district court's disposition of the jurisdictional issue in this Court under 28 U.S.C. § 1651—the so-called All Writs Act. On January 6, 1977, petitioners filed a petition for writ of certiorari under that Act (No. 76-939, October Term, 1976), urging the Court to review the district court's decision directly on an accelerated schedule during the 1976 Term of Court. The Government opposed this procedure, urging, among other things, that the Court should permit review to proceed first in the court of appeals according to "the normal appellate course" (Opposition of United States in 76-939, filed January 17, 1977, p. 10). This Court denied the petition for certiorari under the All Writs Act on January 25, 1977.

Petitioners thereupon asked the United States Court of Appeals for the District of Columbia Circuit to grant review of the district court's orders under a simi-

larly accelerated schedule and, on February 3, 1977, the court of appeals entered an order directing the Government to file a response to the petition and to petitioners' motion to establish a schedule for expedited consideration and staying *sua sponte* all further proceedings in the district court. In that response, the Government for the first time expressly acknowledged that antitrust immunity might be available in a case filed by the Government under Section 2 of the Sherman Act, even though the complaint alleges a "continuing course of conduct." The Government's position, as stated to the court of appeals, was that where such a claim of immunity is made the court must determine with respect to each charge embodied in the complaint whether application of the antitrust laws would be repugnant to the specific provisions and purpose of the regulatory scheme (U.S. Memo dated March 14, 1977, p. 50):

> "The proper method for determining whether there is an implied immunity from the antitrust laws is to conduct a particularized examination of the conduct challenged and the provisions of the Communications Act which are relevant to them in order to see if there is an irreconcilable conflict."

In articulating this new position, the Government did not contend—as, indeed, it could not contend, given the memorandum and opinion of the district court—that "a particularized examination of the conduct challenged and the provisions of the Communications Act" had been made by the district court. Nonetheless, it urged the court of appeals to deny the petition for certiorari, without itself making such a particularized examination, on the ground that "issuance of an ex-

traordinary writ is not appropriate in this case" (U.S. Memo dated March 14, 1977, p. 23). After substantial further briefing, including a memorandum submitted as *amicus curiae* by the FCC, the court of appeals issued its order dated May 26, 1977, denying, without opinion, the writ of certiorari which petitioners had requested and, on July 7, 1977, issued a further order denying rehearing.

REASONS FOR GRANTING THE WRIT

I. ISSUANCE OF A WRIT IS NECESSARY TO PROTECT THE PARTIES AND THE PUBLIC FROM THE UNIQUE BURDENS OF THIS POINTLESS LITIGATION, TO PREVENT FRUSTRATION OF THE POLICIES OF THE CONTROLLING REGULATORY STATUTES AND TO ASSURE THE ORDERLY ADMINISTRATION OF JUSTICE.

The fundamental questions with respect to the applicability of the federal antitrust laws to the charges encompassed within the Government's complaint as presented in this petition can and should be resolved before discovery and trial in the case are permitted to proceed. There is no doubt—nor, indeed, has there been any real controversy—that the record in this case contains all of the jurisdictional facts necessary to resolve these fundamental questions. Hence, this case falls squarely within the decision in *Gordon* v. *New York Stock Exchange, Inc.*, 422 U.S. 659, 686 (1975), in which the Court held that, to the extent questions of antitrust immunity can be resolved at the outset of liigation rather than after discovery and trial, such questions should be so resolved.[3]

[3] The common sense underlying this aspect of the *Gordon* decision can hardly be denied. Given the enormous burdens of major antitrust litigation, not only upon the parties and numerous non-parties that inevitably become involved, but also, most importantly, upon the courts themselves, the necessity for avoiding unnecessary litigation of that kind, or antitrust litigation much broader than is actually within the proper jurisdiction of the courts, is obvious.

It would be difficult to imagine a case more appropriate than this one for application of this principle. The sheer size of the case, the length of time that necessarily would be involved in its preparation and trial, the enormous expenditure of money and effort, and the impact which such litigation inevitably would have upon the courts, the regulatory process, numerous non-parties and the general public threaten to make this case the most burdensome in the history of American law. The mere suggestion that such a case should be undertaken prior to a definitive resolution of the extent of the district court's jurisdiction—or even the existence of jurisdiction with respect to a single one of the charges alleged in the Government's complaint—seems unthinkable.

The extent of the burdens of discovery and trial in this case is demonstrably real. As a result of the strategy the Government has followed in its efforts to avoid dismissal of its complaint, the case has taken on an unprecedented breadth and scope. Thus, the basic monopolization charge against the Bell System is now said by the Government to be based in part upon the alleged misuse of the "original patents on telephone equipment [in effect from 1876 to 1893] to unlawfully attain a monopoly of local telephone exchanges" and "the acquisition of Western Electric [in 1882]" (U.S. Answer to Interrogatory 7, filed December 15, 1976, p. 35). Similarly, the Government has now stated that it will rely upon prohibitions contained in the tariffs of the Bell System from the early 1900's until 1968 against

the interconnection of customer-provided terminal equipment, upon the Bell System's alleged delay from 1949 to 1961 in providing interconnections with radio common carriers, and upon the Bell System's opposition in proceedings before the FCC "in early 1960's" to the provision of intercity private line services by so-called specialized common carriers (U.S. Memo dated March 24, 1975, pp. 10-11).

As thus amplified, the complaint brings into issue virtually every tariff ever filed by the Bell System either with the Federal Communications Commission or with a state regulatory agency. In addition, the Government has characterized practically every contact among Bell System companies that in any way bears upon any of the activities being challenged as a part of a "conspiracy" (Complaint, ¶¶ 27-29), and it has asserted that it must be accorded the right to present and rely upon still further as yet unspecified conduct if its complaint against the Bell System is brought to trial.[4]

The impact of this strategy upon discovery and trial of this case is obvious. The defendants must prepare to defend each and every activity in which the Bell System has engaged since its inception which might arguably be said to be anticompetitive. This is an incredibly detailed and time-consuming task for an enterprise which is regulated under a standard different from and inconsistent with that of competition and which has, by reason of such regulation, historically been led, and sometimes compelled, to follow policies antithetical to competition. Defendants must review all of the documents in their own files relevant to any such ac-

[4] U.S. Memo dated March 24, 1975, p. 71; U.S. Memo dated April 3, 1975, p. 32; Transcript of November 16, 1976, at 39-40; U.S. Memo dated March 15, 1977, pp. 6-7.

tivity; they must subpoena every non-party that may have been involved in challenged activities; and they must even conduct discovery against the regulatory agencies that supervised and controlled these activities.

The cost of such a process is certain to be staggering. It has been estimated that the costs merely to assemble and analyze the documentary material necessary for trial preparation in this case will be between $335 million and $530 million for the Bell System alone and that this process will require the efforts of some 3,000 persons.[5] To this must be added the costs of the other trial preparation activities, the enormous costs of trial itself, the costs that involvement in such litigation would impose upon non-parties, including governmental agencies, and the costs to the Government itself in prosecuting such a case. In light of all of these considerations, the total costs of preparation and trial of this case in its present posture would unquestionably approach $1 billion and may even substantially exceed that amount.

However, the dollar expenditures are merely the tip of the iceberg insofar as the burdens of this litigation are concerned. From the standpoint of the defendants, the diversion of critical management personnel from their primary responsibility of running the Nation's telecommunications network poses an even more serious problem than the amounts of money involved. To a great extent, the very people now involved in this task would have to devote their energies to this litigation in order for defendants adequately to defend themselves against the myriad of charges that have now been injected into this case by the Government.

[5] Affidavit of Harold S. Levy, AT&T General Attorney, filed in the court of appeals on July 11, 1977, pp. 12-18, 20-21.

Moreover, the adverse impact upon the Nation's telecommunications system resulting from such a diversion of critical personnel would be further exacerbated by the impact that the pendency of this case would have upon the regulatory process through which the policies which govern telecommunications common carriers are evolved. The pendency of this case is certain to have a substantial impact upon the regulatory agencies' ability and willingness to regulate the activities of telecommunications common carriers. In fact, such an impact is already apparent in at least two recent decisions of the FCC where that agency has failed to pass on questions properly before it by reason of the pendency of this case or has carefully tailored its decision so as to avoid possibly affecting issues involved in the case.[6] Such deference to the pendency of an antitrust case concerning matters properly within the regulatory sphere is destructive of the regulatory process—a process which, of course, assumes that the regulatory agencies will take the responsibility for these matters and will resolve all controversies relating to them in accordance with the public interest standard of the statutes under which they operate.

The pendency of this antitrust case challenging pervasively regulated conduct also will inevitably have an adverse impact upon the participation of the telecommunications common carriers in the regulatory process—participation which has long been recognized to be a vital part of that process. *American Tel. & Tel. Co.* v. *FCC,* 487 F.2d 864 (2d Cir. 1973); *cf. Public*

[6] See *AT&T, Charges for Interstate Telephone Service,* 64 F.C.C. 2d 1 (1977); *Satellite Business Systems,* 62 F.C.C.2d 997 (1977), *review pending sub nom. United States* v. *FCC,* No. 77-1249 (D.C. Cir.).

Utilities Comm'n of California v. *United States,* 356 F.2d 236 (9th Cir.), *cert. denied,* 385 U.S. 816 (1966). If the participation of the carriers is to contribute meaningfully to the development of regulatory policies, that participation must be based upon the same standard that is used by the regulatory agencies themselves —that is, the public interest standard. Yet the mere pendency of this case practically assures that such carrier participation in the regulatory process cannot, and will not occur. For with antitrust charges of the magnitude of those involved in this case pending unresolved, both the defendants and the other companies involved in the provision of telecommunications service will be severely constrained in their abilities to participate in the development of policies designed to serve the public interest in any situation where those policies even arguably could be said to have anticompetitive effects. See *Alabama Power Co.* v. *Alabama Electric Cooperative, Inc.,* 394 F.2d 672, 677 (5th Cir.), *cert. denied,* 393 U.S. 1000 (1968); *cf. Franchise Realty Interstate Corp.* v. *San Francisco Loc. Joint Exec. Bd.,* 542 F.2d 1076, 1084-86 (9th Cir. 1976), *cert. denied,* 97 S. Ct. 1571 (1977).

The chilling effect of the pendency of this case upon the regulatory process cannot, of course, precisely be measured. However, it is certain to be substantial and increasing throughout the long years that would be required for discovery and trial. Indeed, the Government's effort to impose the inconsistent standard of competition upon activities regulated under the public interest standard has already begun to place the defendants in a difficult position[7] and

[7] This problem is illustrated by the recent decision of the FCC in *Interconnection Between Wireline Telephone Carriers and Radio*

this situation is certain to become more difficult as time progresses, especially in light of the fast-changing technology of the telecommunications industry and the need constantly to adapt regulatory policy to such changes in technology.

Finally, the continued pendency of this case without a definitive resolution of the fundamental jurisdictional questions which it presents will have serious adverse effects upon the judicial system itself. The obvious burdens of discovery and trial in this case alone are sufficient to demonstrate this fact. The management of a case involving hundreds of millions of pages of documentary material, hundreds of thousands of pages of deposition transcript, and thousands of subpoenas directed to non-parties, many of which will inevitably involve contested motions, is a burden upon

Common Carriers, FCC 77-61 (January 31, 1977), a case involving an agreement covering many aspects of the relationship between the general service carriers and the radio common carriers, which had been worked out over fifteen months of negotiations under the aegis of the Commission's Common Carrier Bureau. When this agreement was presented for approval, the Commission refused to decide whether or not the agreement was lawful under the Communications Act and, instead, merely accepted the agreement with the caveat that such acceptance did not constitute approval—a course obviously chosen because it would leave the Department of Justice free to pursue the claim which it has advanced in this case that that agreement is in violation of the antitrust laws. Looked at strictly from the standpoint of the Government's antitrust case alone, this course of action does not necessarily seem inappropriate. However, from the standpoint of the regulatory process, such an approach seems certain to have disastrous consequences, for the Commission's order with respect to the *Radio Common Carriers* agreement would leave petitioners to face the Department's charges that the agreement worked out with the radio common carriers under the Common Carrier Bureau's aegis violates the antitrust laws while, at the same time, the FCC has virtually invited petitioners to implement that agreement.

the judiciary that plainly should not be lightly undertaken. But again, that is only the beginning of the problem. Since the complaint in this case was filed, more than thirty private antitrust suits have been filed against the Bell System, each seeking treble damages, many also seeking some form of injunctive relief, and all directed against the same kinds of regulated activities that are involved in this case. The steady proliferation of these private cases adds to the burdens, not only of the defendants, but of the courts.

In all of these circumstances, the need for a threshold resolution of the fundamental questions which go to the very existence of antitrust jurisdiction over the pervasively regulated conduct encompassed within the complaint in this case is far clearer than it was even in the *Gordon* case. For here, it is not only true that, as in *Gordon*, a proper resolution of the jurisdictional questions might dispose of the entire litigation, but, in addition, it is also plain that the mere presence of these questions is encouraging the filing of further litigation and complicating this particular case by forcing the Government continually to expand the scope of its complaint in an effort to avoid the likelihood that the complaint will be dismissed.

This latter aspect of the proceedings to date—which insofar as petitioners are aware is unique in the history of major Government civil antitrust cases—gives the questions presented in this petition a dimension of importance that exceeds any that has ever been presented in similar petitions to this Court. The strategy adopted by the Government—not from choice, but out of necessity generated by the uncertain legal environment—threatens to make this case absolutely unman-

ageable on any practical basis by the courts. Indeed, the Attorney General himself has acknowledged as much, suggesting in a recent interview that the case may be "beyond the capacity of the courts" (Interview of the Honorable Griffin B. Bell with Walter Guzzardi for Fortune Magazine, July 28, 1977, Department of Justice release, p. 5).

The Attorney General suggested that "Congress ought to maybe handle these cases" (*id.*, p. 6)—a suggestion which the Attorney General himself characterized as "shocking," at least at first blush (*id.*), and one which certainly seems on its face to be inconsistent with the established system of justice in this country. But the plain fact is, as the Attorney General himself implicitly recognized, that this case is out of control and something must be done to restore some semblance of rationality to the case if it is not to go down in history as the single most wasteful, futile exercise ever attempted by our legal system.

Petitioners submit that, short of a voluntary dismissal, rationality can be injected into the case only by a definitive threshold determination of the proper scope of antitrust jurisdiction over the Government's charges. Such a determination would make the entire process of discovery and trial unnecessary in the event the Court holds that antitrust jurisdiction cannot properly be asserted over any of the Government's charges. Even if the Court upholds antitrust jurisdiction over some charges, however, it would sharply reduce the magnitude of the case in the event it holds that many of the charges are beyond the scope of such jurisdiction by reason of the pervasive regulation to which the matters with which they are concerned are subject. And even if the Court upheld

antitrust jurisdiction over all of the Government's charges, it could not help but make the case more manageable than it is in its present posture for, in that event, the Government could at least abandon those charges injected into the case solely for the purpose of buttressing its jurisdictional position.[8]

Since immediate review will—indeed, is absolutely imperative to—expedite the case, the fact that this is a Government civil antitrust case, subject to the terms of the Expediting Act and therefore reviewable at this stage only under the All Writs Act, does not in any way detract from the need for such review. The Court has itself recognized the need for early, definitive review in similar, although far less imperative situations, by granting review of Government civil antitrust cases where fundamental questions of the proper scope of antitrust jurisdiction over regulated activities were involved. *United States Alkali Export Association, Inc.* v. *United States*, 325 U.S. 196 (1945); *Far East Con-*

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[8] Assuming that the Government's complaint is not dismissed in its entirety, as petitioners contend it should be, a substantial narrowing of the scope of this case is particularly critical, both from the standpoint of the defendants and from the standpoint of the Government itself. As presently postured, the defendants find it virtually impossible fully to prepare to defend themselves against the Government's complaint, since the scope of the matters said to be involved is so broad that petitioners cannot focus their efforts upon any particular event or time frame. From the Government's standpoint, such a narrowing is equally necessary to permit a realistic preparation for trial. Moreover, the Government is faced with the possibility that if it tries the case on all of the broad issues now said to be involved, an ultimate reversal on jurisdictonal grounds on any substantal issue might require a remand of the case for further proceedings, including a retrial of all, or at least many, of the aspects of the case.

ference v. *United States*, 342 U.S. 570 (1952).[9] The same procedure is appropriate in this case, particularly in light of the necessity of such review "to the further conduct of the case" (*United States* v. *General Motors Corp.*, 323 U.S. 373, 377 (1945)).[10]

II. ISSUANCE OF THE WRIT IS FURTHER JUSTIFIED BY THE FACT THAT THE DECISION OF THE DISTRICT COURT IS IN CONFLICT WITH A CONSISTENT LINE OF DECISIONS OF THIS COURT HOLDING THAT THE ANTITRUST LAWS DO NOT APPLY TO MATTERS SUBJECT TO A PERVASIVE SCHEME OF COMMON CARRIER REGULATION.

Even beyond the extraordinary procedural circumstances that require immediate review in this case, issuance of the writ requested here is justified on the ground that the decision of the district court is palpably erroneous and in conflict with a consistent line of decisions of this Court recognizing the need to avoid subjecting the same regulated conduct to inconsistent standards in order to preserve the workability of a regulatory scheme and to prevent the danger of gross

[9] The *Far East Conference* case is particularly relevant here, for the decision of the district court in that case was indistinguishable from that of the district court here—that is, the court in *Far East Conference* essentially abandoned any effort to resolve the question of the proper scope of its antitrust jurisdiction and asserted jurisdiction over the entire complaint, just as the district court did here, on the belief that it surely must have some jurisdiction over some aspects of the complaint. *United States* v. *Far East Conference*, 94 F. Supp. 900, 902 (D.N.J. 1951), *rev'd*, 342 U.S. 570 (1952). This Court's willingness to review the district court's decision in *Far East Conference*—a case that did not begin to present all of the compelling reasons for review that are present here—fully justifies the grant of this petition.

[10] *Accord*, *Land* v. *Dollar*, 330 U.S. 731, 734 n.2 (1947); *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685 n.3 (1949); *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148, 153-54 (1964).

unfairness to a regulated company. *Gordon* v. *New York Stock Exchange, Inc.*, 422 U.S. 659, 689 (1975); *United States* v. *National Association of Securities Dealers, Inc.*, 422 U.S. 694, 721-22, 735 (1975).

The principle underlying the *Gordon-NASD* prohibition against the imposition of inconsistent standards upon regulated conduct has been applied by this Court to a wide variety of fact situations arising under numerous regulatory schemes with the result in each case turning upon the nature of the regulation involved and the relationship of that regulation to the charges alleged in the particular complaint. However, there is one rule that uniformly has been employed by this Court to define the *a fortiori* case for implied immunity: where the challenged conduct is subject to a pervasive scheme of common carrier regulation, such conduct is necessarily immune from the antitrust laws, for pervasive common carrier regulation is inherently inconsistent with the application of the antitrust laws.

Without deviation, this rule has been adhered to by the Court in a long line of cases originating shortly after the enactment of the first truly pervasive scheme of federal common carrier regulation.[11] In cases involving matters subject to such regulation, the Court has

[11] Prior to the enactment of the Transportation Act of 1920 (41 Stat. 456), federal regulation was focused primarily on the prevention of abuses of competition like unjustly discriminatory rates or rebates. By largely supplanting competitive forces with a comprehensive set of regulatory controls designed to foster the development and maintenance of adequate common carrier services, the Transportation Act of 1920 reflected an important shift in federal regulatory policy "from one of prohibiting restraints on competition to one of providing relief from the rigors of competition." *FCC* v. *RCA Communications, Inc.*, 346 U.S. 86, 92 (1953). See also *New England Divisions Case*, 261 U.S. 184, 189 (1923); *Wisconsin R.R. Comm'n* v. *Chicago, B.&O. R. Co.*, 257 U.S. 563,

consistently upheld claims of antitrust immunity. *Keogh* v. *Chicago & North Western R. Co.*, 260 U.S. 156 (1922); *Terminal Warehouse Co.* v. *Pennsylvania R. Co.*, 297 U.S. 500 (1936); *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296 (1963); *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363 (1973). Indeed, the *only* case involving a pervasively regulated common carrier in which this Court has upheld the assertion of antitrust jurisdiction,[12]

585 (1922); 1 Sharfman, Interstate Commerce Commission 177-244 (1931).

[12] Although occasionally miscited as such, the cases involving companies subject to the Shipping Act of 1916 (46 U.S.C. § 801 *et seq.*) are not cases involving a need to accommodate the antitrust laws to pervasive common carrier regulation. The Shipping Act established a hybrid form of regulation: although the companies subject to that regulatory scheme are characterized as "common carriers," the form of regulation established by the Shipping Act bears no resemblance to the pervasive form of public utility-type regulation to which most other common carriers are subject. Thus, the Shipping Act provides no tariffing procedure comparable to that contained in the Communications Act and the Interstate Commerce Act; there is in the Shipping Act no regulation with respect to the overall rate of return of shipping companies, the quality of these so-called common carriers' services, or their duty to establish or maintain service over any particular route; and with respect to shipping conference agreements, the Shipping Act merely establishes a scheme of self-regulation policed by the shipping conferences under the general supervision of the FMC. As a result of the hybrid form of regulation to which the shipping industry is subject, the decisions of this Court dealing with antitrust claims against participants in that industry have reached divergent results stemming from a gradual change in the Court's perception of the nature of that regulatory scheme. In its first antitrust case involving carriers subject to the Shipping Act, *United States Navigation Co.* v. *Cunard Steamship Co.*, 284 U.S. 474 (1932), the Court treated shipping conferences as though they were subject to the same kind of pervasive regulation applicable to other common carriers, and following the reasoning of its earlier decision in *Keogh* v. *Chicago & North Western R. Co.*, 260

Georgia v. *Pennsylvania R. Co.*, 324 U.S. 439 (1945), involved an activity—price fixing through railroad rate bureaus—that Congress had deliberately declined on at least two occasions to bring within the regulatory jurisdiction of the ICC.[13] Hence, although a pervasively regulated common carrier was involved in the case, the specific matter involved was not subject to such regulation, and the Court expressly relied upon this fact in upholding antitrust jurisdiction, indicating, at the same time, that such jurisdiction could not properly have been asserted if the matter had been subject to pervasive regulation (*id.* at 457).

Similarly, in cases involving companies subject to generally lesser forms of regulation in which this Court permitted the assertion of antitrust jurisdiction as compatible with the regulatory scheme involved, the Court has been careful to make plain that its holdings do not apply to matters subject to pervasive common

U.S. 156 (1932), dismissed an antitrust complaint concerning a conference agreement on the ground that the Shipping Act wholly superseded the antitrust laws. In the next Shipping Act case, *Far East Conf.* v. *United States*, 342 U.S. 570 (1952), the Court began to retreat from this position by dismissing the antitrust case and directing the Department of Justice to present its claims to the Maritime Board, but leaving open the possibility that the Department could return to the courts after exhausting its administrative remedies if there were any further matters for the courts to deal with. Finally, in *Carnation Co.* v. *Pacific Westbound Conf.*, 383 U.S. 213 (1966), the Court recognized the less stringent form of regulation created by the Shipping Act and held that such regulation is not in all cases inconsistent with the application of the antitrust laws.

[13] This gap in the regulation was closed in 1948 with the passage of the Reed-Bulwinkle Act (62 Stat. 472), which gave the ICC the authority to regulate railroad rate bureaus and thus changed the result in *Georgia* v. *Pennsylvania R. Co. See Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296, 306 n.11 (1963).

carrier regulation. As indicated above, this was the approach taken in the very cases relied upon by the district court. See *Otter Tail Power Co.* v. *United States,* 410 U.S. 366, 373-74 (1973); *United States* v. *Radio Corp. of America,* 358 U.S. 334, 348-49 (1959). See also *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 352 (1963); *Silver* v. *New York Stock Exchange,* 373 U.S. 341, 360-61 (1963); *California* v. *FPC,* 369 U.S. 482, 485 (1962). Hence, a consistent line of decisions of this Court in cases involving antitrust charges against regulated companies reflects the principle that is controlling in this case: where the charges sought to be raised in an antitrust complaint concern matters subject to pervasive common carrier regulation, antitrust jurisdiction cannot properly be asserted.

The district court's refusal to give effect to this principle places its decision in clear conflict with all of these decisions of this Court. Certainly it cannot seriously be disputed that the Communications Act and comparable state regulatory statutes applicable to telecommunications common carrier enterprises establish a pervasive scheme of common carrier regulation. Indeed, the statutory scheme applicable in this industry is a classic example of such regulation.[14] Hence, the principle set out above is clearly applicable to the per-

[14] In its brief as *amicus curiae* in *Ricci* v. *Chicago Mercantile Exchange,* 409 U.S. 289 (1973), the Department of Justice itself specifically identified the regulation of telecommunications common carriers under Title II of the Communications Act as an example of a "pervasive regulatory scheme" (Brief for the United States at 23 n.11). And in its brief as *amicus curiae* in *Gordon* v. *New York Stock Exchange, Inc.,* 422 U.S. 659 (1975), the Department distinguished the self-regulation found in the securities industry from a "comprehensive, public utility-like system of government regulation" such as that found in the telecommunications industry (Brief for the United States at 16, 35-36).

vasively regulated activities of telecommunications common carriers. Petitioners therefore submit that this controlling legal principle requires that the Government's entire complaint in this case be dismissed.

Although the Government contended otherwise in the courts below, there is no really legitimate doubt that the pervasive regulatory scheme applicable to telecommunications common carriers encompasses every charge advanced by the Government in this case. A charge-by-charge examination of the Government's complaint, such as that conceded to be appropriate by the Government itself in the court of appeals, conclusively demonstrates that fact.[15] Moreover, such an examination also demonstrates the fundamental soundness of this Court's consistent recognition that activities subject to pervasive common carrier regulation must be held immune from prosecution under the antitrust laws—that is, that there is an utter repugnancy between the kinds of controls imposed upon carriers by such a regulatory scheme and the concept of unfettered competition embodied in the antitrust laws. This point is sufficiently important to warrant a brief demonstration of its soundness in this petition, notwithstanding that substantial further briefing may be required if this petition is granted.

The Government's charge that the Bell System violated the antitrust laws by refusing to sell terminal equipment to subscribers (Complaint, ¶ 29(f)), for

[15] This fact was also emphatically confirmed by the FCC in its first *amicus curiae* memorandum filed in the district court (FCC Memo dated December 30, 1975, pp. 28-29):

> "Insofar as the specific allegations of conduct are concerned, . . . the Commission regards virtually all of them as within its own regulatory jurisdiction."

example, unquestionably concerns a matter that is subject to pervasive common carrier regulation. Indeed, the Government's effort to impose antitrust liability with respect to this matter conflicts with the whole history of regulation of telecommunications common carriers. Even before the Communications Act was passed, the state regulatory agencies, exercising responsibility over the service provided on the nationwide telecommunications network, had made it clear that telecommunications common carriers were obligated to maintain ownership of terminal equipment on the premises of subscribers and this obligation was strictly enforced.[16] When the Communications Act was passed in 1934, this regulatory policy was expressly preserved in the structure of that Act. The Communications Act regulates telecommunications "service" from end to end and does not suggest that the carriers should be required to sell the equipment which is necessary for

[16] In *City of Los Angeles* v. *Southern California Telephone Co.*, 2 P.U.R. (n.s.) 247 (Cal. R.R. Comm'n 1933), for example, the California Railroad Commission squarely rejected the attempt of the City of Los Angeles to substitute its own telephone facilities for those of the telephone company (*id.* at 249):

> "The Commission has frequently expressed the opinion that a divided ownership of telephone equipment and responsibility for its maintenance is not compatible with efficient telephone service. It has frequently been declared that a telephone utility must own and maintain all facilities required for the transmission of messages from one subscriber to another. Almost without exception a similar view has been expressed by the regulatory Commissions of other states."

See also *Quick Action Collection Co.* v. *New York Tel. Co.*, P.U.R. 1920D 137 (N.J. Bd. Pub. Util. Comm'rs 1920); *Hotel Sherman Co.* v. *Chicago Tel. Co.*, P.U.R. 1915F 776, 782-83 (Ill. Pub. Util. Comm'n 1915); *New England Tel. & Tel. Co.* v. *Department of Pub. Util.*, 262 Mass. 137, 159 N.E. 743 (1928); *Gardner* v. *Providence Tel. Co.*, 23 R.I. 262, 49 A. 1004 (1901); *Pennsylvania Pub. Util. Comm'n* v. *Bell Tel. Co. of Pa.*, 20 Pa. P.U.C. 702 (1940); *Customers of Concordia Tel. Co.*, 3 P.U.R. (n.s.) 522 (Mo. Pub. Serv. Comm'n 1934); *State Agricultural and Industrial School*, 4 N.Y.P.S.C.R. 219 (N.Y. Pub. Serv. Comm'n, 2d Dist. 1914).

such service.[17] Quite the contrary, the Act imposes a firm obligation upon the carriers to "furnish . . . communication service upon reasonable request therefor" (47 U.S.C. § 201(a)) including all "instrumentalities," "facilities" and "apparatus" incidental thereto (47 U.S.C. § 153(a), (b)).

The Communications Act does not by its terms preclude the Federal Communications Commission or any state regulatory agency from permitting carriers to sell equipment, or from requiring them to offer service on less than an end-to-end basis. But, as the FCC itself recently pointed out, such an approach to the provision of telecommunications service "would constitute a basic and substantial change in the nature of these . . . services" (*Interstate and Foreign MTS and WATS*, 35 F.C.C.2d 539 (1972)). Since any such change would have to be embodied in tariffs filed and accepted by regulatory agencies *before* the carriers could sell equipment, the Government's charge amounts to an

[17] In this respect the regulation of telecommunications common carriers is fundamentally different from that applicable to the electric power distribution utility involved in *Cantor* v. *Detroit Edison*, 428 U.S. 579 (1976). The regulatory scheme involved in *Cantor* did not impose an end-to-end service obligation upon electric utilities and did not require those utilities to provide electrical appliances such as light bulbs. Consequently, this Court viewed the practice involved in that case—that is, the practice of providing light bulbs to utility customers as a part of electric power service—as essentially outside the pervasive regulatory scheme applicable to the distribution of electricity, and therefore not entitled to antitrust immunity. Plainly, however, the very line of reasoning adopted by this Court in *Cantor* requires precisely the opposite result in this case.

effort to impose antitrust liability upon the petitioners for failing to do something which is subject to regulatory control and which might not even be permitted by the responsible regulatory agency.

The Government's charges that petitioners have attempted to obstruct, and obstructed, interconnection (Complaint, ¶ 29(a)-(e)) collide head-on with the same regulatory history, for the regulatory policies requiring end-to-end communications service are fully as much at stake where non-carrier facilities and equipment are sought to be connected to the network as where a carrier would sell equipment to its subscribers. The decisions cited above (*supra*, p. 30 n.16), as well as other regulatory decisions in the same general period,[18] make it plain that telecommunications common carriers have been obligated under long-standing regulatory policy to provide an end-to-end service wherever that has been reasonably possible, and that interconnection with facilities not owned, operated and maintained by the telephone companies has been limited to

[18] In those few instances in which telephone companies had permitted users to provide their own equipment, the state regulatory agencies ordered the companies involved to acquire that equipment and to assume full responsibility for the complete end-to-end service. See, *e.g.*, *Bluffs & Winchester Tel. Co.*, P.U.R. 1915A 928 (Ill. Commerce Comm'n 1915); *Franksville Tel. Co.*, P.U.R. 1917A 270 (Wis. R.R. Comm'n 1916); *Curtis Tel. Co.*, P.U.R. 1917A 674 (Neb. Ry. Comm'n 1916); *Springs Mut. Tel. Co.*, P.U.R. 1918A 488 (S.D. Bd. R.R. Comm'rs 1917); *Littlepage* v. *Mosier Valley Tel. Co.*, P.U.R. 1918E 425 (Ore. Pub. Serv. Comm'n 1918); *Re Swanson*, P.U.R. 1920E 633 (Cal. R.R. Comm'n 1920); *Tognini, Ghezzi & Dalidio Tel. Co.*, P.U.R. 1921C 72 (Cal. R.R. Comm'n 1921); *Badger Mut. Tel. Co.*, P.U.R. 1926A 361 (Wis. R.R. Comm'n 1925); *Industry Tel. Co.*, P.U.R. 1928A 435 (Ill. Commerce Comm'n 1927).

emergency situations involving the safety of life or property and to hazardous or inaccessible locations.[19]

Moreover, once again, the Communications Act preserved regulatory control over the matters involved. Section 201(a) of that Act makes it clear that the right of carriers "to establish physical connections with other carriers" exists only "in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest." Again, the Act does not preclude the FCC or a state regulatory agency from ordering interconnection. However, the structure of the Act makes it plain that telecommunications common carriers have no absolute right—and certainly have no duty—to interconnect, unless and until the Commission has ordered them to do so.

The Government's interconnection charges simply ignore this regulatory requirement. The Government has not charged, and cannot charge, that the Bell System has willfully violated orders of the FCC or any other regulatory agency with respect to interconnection.[20] Hence, the charges of monopolization through

[19] See, *e.g.*, *Interstate and Foreign MTS and WATS*, 35 F.C.C.2d 539 (1972); *AT&T Regulations Relating to Connections of Telephone Company Facilities with Certain Facilities of Customers*, 32 F.C.C. 337 (1962); *Southern Bell Tel. & Tel. Co.*, 31 P.U.R.3d 173 (N.C. Util. Comm'n 1959).

[20] Even if the Government did advance such a charge, it would not, of course, justify the assertion of antitrust jurisdiction. The Communications Act constitutes a "self-contained remedial scheme," which itself provides appropriate remedies for any violation of its provisions. See, *e.g.*, *Terminal Warehouse Co.* v. *Pennsylvania R. Co.*, 297 U.S. 500, 511, 514 (1936); 47 U.S.C. §§ 206-209.

obstruction of interconnection amount to a contention that the Bell System had an obligation under the antitrust laws to interconnect its facilities with the facilities and equipment of others without regard to regulatory hearings or orders—an obligation which, if imposed, would be flatly inconsistent with both longstanding regulatory policy and the express provisions of the Communications Act.[21]

The remaining specific charge set out in the Government's complaint—that petitioners caused Western Electric to manufacture substantially all of the telecommunications equipment requirements of the Bell System and caused the Bell System to purchase substantially all of its telecommunications requirements from Western Electric (Complaint, ¶ 29(g)-(h))—is also in conflict with the regulatory scheme under which petitioners must operate. As already pointed out, that scheme requires petitioners to provide service, including the facilities and equipment necessary therefor, upon request and at reasonable rates. Indeed, the Communications Act goes even further and permits the Commission to order a telecommunications common carrier to provide itself "with adequate facilities for the expeditious and efficient performance of its service

[21] See, *e.g.*, *Western Union Telegraph Co.*, 17 F.C.C. 152 (1952), holding that Western Union had no right to obtain, and the Bell System had no duty to provide, interconnection of intercity video transmission channels "in view of the absence of evidence sufficient to support a finding of necessity or desirability in the public interest of interconnected operation of intercity video transmission channels and facilities" (*id.* at 175), despite the Commission's explicit recognition that the requested interconnection might have increased competition (*id.* at 174). See also *Doniphan Tel. Co.* v. *American Tel. & Tel. Co.*, 34 F.C.C. 949 (1963); *Oklahoma-Arkansas Tel. Co.* v. *Southwestern Bell Tel. Co.*, 10 F.C.C. 244 (1943).

as a common carrier" if it finds that the carrier has failed to do so (47 U.S.C. § 214(d)). The inclusion of Western Electric and the operating units of the Bell System in a single enterprise, which the Government here attacks as a violation of the antitrust laws, thus contributes to the Bell System's ability to fulfill its statutory duties. Significantly, the Government has not alleged, nor could it realistically allege or prove, that the integrated structure of the Bell System has resulted in lower quality or higher priced common carrier telecommunications service than would have been available had the constituent parts of the System operated as independent companies.[22]

The plain, irreconcilable conflict between each one of the specific charges advanced in the Government's complaint and the pervasive scheme of common carrier regulation applicable to the matters to which each

[22] Western Electric is generally recognized as the most efficient manufacturer of telecommunications equipment in the world. Nonetheless, its operations have been subject to constant scrutiny by the FCC and other regulatory agencies, most recently in the extensive investigation conducted by the FCC which culminated with its decision in *AT&T, Charges for Interstate Telephone Service*, 64 F.C.C.2d 1 (1977). During the course of that investigation, the FCC retained the services of Touche, Ross & Co. as management consultants to make an independent study of the impact of the vertical relationship between Western Electric and the other units of the Bell System. As characterized by the Administrative Law Judge responsible for that proceeding, the result of that inquiry was a determination that (*id.* at 486):

> "[T]he 'integration' of Western Electric and Bell Labs in the Bell System has provided, and continues to provide, definitive useful public benefits in the form of system-wide expertise and innovations that have, in turn, led to monumental technological advances. . . ."

In its Final Report and Order, the FCC itself reaffirmed this determination (*id.* at 19).

of those charges relates requires that the complaint in this case be dismissed. Nor do the additional charges sought to be injected into the case through the Government's briefs alter this conclusion. The only new substantive charge which the Government injected through this strategy was an attack upon the pricing practices of the Bell System. This belated charge added nothing whatever to the case insofar as the correctness of the assertion of antitrust jurisdiction was concerned, for pricing is surely at the heart of the regulatory scheme under which common carriers operate and is subject to the most pervasive controls applicable to any common carrier activity. See *Keogh* v. *Chicago & North Western R. Co.*, 260 U.S. 156 (1922).

The remainder of the charges advanced by the Government in an effort to avoid dismissal of its complaint are all plainly ancillary to the three original categories of charges and the added charge with respect to pricing. Indeed, the vast majority of these charges amount to nothing more than slight variations on the basic theme of the principal charges. These belated charges could and should have been dismissed by the district court along with the Government's principal charges to which they relate, and this Court has precisely so held on two separate occasions. Thus, in *United States* v. *National Association of Securities Dealers, Inc.*, 422 U.S. 694 (1975), the Court held that Count I, alleging certain activities ancillary to the conduct complained of in the other counts of the complaint, also should be dismissed where (*id.* at 734):

> "There can be little question that the broad regulatory authority conferred upon the SEC by the Maloney and Investment Company Acts enables it to monitor the activities questioned in Count I, and the history of Commission regulations suggests no laxity in the exercise of this authority. To the extent that any of appellees' ancillary activities frustrate the SEC's regulatory objectives it has ample authority to eliminate them."

See also *United States Navigation Co.* v. *Cunard Steamship Co.*, 284 U.S. 474 (1932).

The jurisdiction of the FCC and the state regulatory agencies to deal with the ancillary charges of the Government in this case and its vigor in doing so cannot seriously be questioned. *National Association of Regulatory Utility Commissioners* v. *FCC*, 525 F.2d 630, 638 (D.C. Cir.), *cert. denied*, 425 U.S. 992 (1976); *COMSAT General Corp.*, 59 F.C.C.2d 344, 348 (1976). The district court's failure to recognize this fact and to deal with the Government's belatedly asserted charges as ancillary to its principal charges is thus in itself inconsistent with the decisions of this Court.

III. ISSUANCE OF THE WRIT IS ALSO JUSTIFIED BY THE FACT THAT THE DECISION OF THE DISTRICT COURT IS IN CONFLICT WITH A DECISION OF THE COURT OF APPEALS FOR THE THIRD CIRCUIT WITH RESPECT TO THE PROPER PROCEDURE FOR RESOLVING AN IMMUNITY ISSUE.

The district court's decision is also in conflict with the decision of the Court of Appeals for the Third Circuit in *Seatrain Lines, Inc.* v. *Pennsylvania R. Co.*, 207 F.2d 255 (3d Cir.), *cert. denied*, 345 U.S. 916 (1953) —a case involving antitrust charges directed at pervasively regulated activities of certain railroads but also including some peripheral charges of anticompetitive conduct outside the scope of the regulatory jurisdiction of the ICC. Although all of these allegations were set forth in a single-count complaint, the court in *Seatrain* held that the proper procedure in dealing with

such a complaint was, as the Government conceded in the court of appeals in this case, to conduct a particularized examination of the various charges and promptly to dismiss with prejudice those charges subject to pervasive regulatory jurisdiction, while at the same time permitting the plaintiff, if it saw fit, to file an amended complaint limited to the claims over which the ICC had no jurisdiction (207 F.2d at 262):

> "[T]he alleged interference with customers by means beyond Commission control should be divorced from charges of customer interference by means within Commission control. Therefore, we think this case should not proceed upon the admixture of appropriate and inappropriate allegations and prayers which constitutes the present complaint, but rather that the judgment of dismissal should be vacated with leave to the plaintiff within a reasonable time to be fixed by the district court to file an amended complaint which shall contain only such matter as is appropriate."

The approach adopted by the district court in this case cannot be reconciled with the approach followed by the Court of Appeals for the Third Circuit in the *Seatrain* case. The Third Circuit's approach gives full effect to the pervasive scheme of common carrier regulation to which it must accommodate an antitrust complaint and permits the complaint to proceed only to the extent that it does not conflict with that regulatory scheme. The approach of the district court in this case, on the other hand, would permit an antitrust plaintiff totally to avoid the effect of a pervasive regulatory scheme upon antitrust jurisdiction simply by supplementing its genuine grievances with even the most tangential charges, so long as the district court could be persuaded that such charges are outside the scheme.

Such an approach reflects no effective accommodation whatever of the antitrust laws to a pervasive scheme of regulation. It permits the same kind of imposition of conflicting standards upon a regulated defendant that was condemned in *Gordon, NASD,* and all of the cases involving pervasive common carrier regulation and thus risks the same kind of interference with the regulatory scheme which those cases were designed to avoid.[23] In this respect the approach adopted here was erroneous and should be corrected by this Court.

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[23] The demonstrable error in the district court's failure to make a particularized evaluation of its jurisdiction with respect to the Government's charges is clearly revealed by several later decisions of other courts in private antitrust actions holding that the activities of telecommunications common carriers there involved—including activities lying at the heart of the Government's complaint in this case—cannot be attacked under the antitrust laws because the assertion of antitrust jurisdiction would be plainly repugnant to the pervasive scheme of common carrier regulation in the telecommunications industry. These recent decisions have established that matters relating to interconnection with the telephone network (the conduct involved in five of the eight specific charges alleged in the Government's complaint), matters relating to the division of revenues between carriers and matters relating to the provision of mobile radio service are all impliedly immune from the antitrust laws. *Phonetele, Inc.* v. *American Tel. & Tel. Co.*, 1977-2 Trade Cases ¶ 61,570 (C.D. Cal. 1977); *Dasa Corp.* v. *General Tel. Co. of Cal.*, Case No. CV-73-2511-LTL (C.D. Cal., May 10, 1977); *Western Electric Co.* v. *Milgo Electronic Corp.*, No. 74-1601-Civ-CA (S.D. Fla., Sept. 20, 1976), *appeal pending*, No. 76-4079 (5th Cir.); *Citizens Utilities Co.* v. *American Tel. & Tel. Co.*, Civil Action No. 39483-WJF (N.D. Cal., Apr. 1, 1977), *appeal pending*, No. 77-1941 (9th Cir.); *Mobilfone* v. *Commonwealth Tel. Co.*, 428 F. Supp. 131 (E.D. Pa. 1977). These decisions are fully applicable to the Government's charges in this case and clearly indicate that most, if not all, of the Government's complaint is outside the proper scope of the antitrust laws and therefore should have been dismissed.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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September 8, 1977

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 1976

No. 77-1009

AMERICAN TELEPHONE & TELEGRAPH CO., ET AL., *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent*

(Filed May 26, 1977)

BEFORE: BAZELON, Chief Judge; WILKEY, Circuit Judge

Order

On consideration of petitioners' petition for writ of certiorari to the United States District Court, the responses thereto, and of petitioners' replies, it is

ORDERED by the Court that the aforesaid petition for writ of certiorari is denied, and, it is

FURTHER ORDERED by the Court, *sua sponte,* that that portion of this Court's order of February 3, 1977 staying further proceedings in the District Court is vacated.

Per Curiam

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 74-1698

UNITED STATES OF AMERICA, *Plaintiff*,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY; WESTERN ELECTRIC COMPANY, INC.; and BELL TELEPHONE LABORATORIES, INC., *Defendants*.

Memorandum Opinion and Order on Jurisdictional Issues

(Filed November 24, 1976)

I.

This action arises under Sections 2 and 4 of the Sherman Antitrust Act, 15 U.S.C. §§ 2 and 4. Plaintiff is the United States of America, acting through the Department of Justice. Defendants are American Telephone and Telegraph Company (AT&T), Western Electric Company, Inc. (Western Electric), a wholly owned subsidiary of AT&T, and Bell Telephone Laboratories, Inc. (Bell Labs), jointly owned by AT&T and Western Electric.

The complaint broadly alleges that defendants, together with numerous co-conspirators, including 23 named telephone companies owned in whole or in part by AT&T, and their subsidiaries (Bell Operating Companies), have engaged in an unlawful combination and conspiracy to monopolize, have attempted to monopolize and have monopolized certain interstate trade and commerce in telecommunications equipment and submarkets thereof. Plaintiff seeks declaratory and injunctive relief, including complete divestiture of Western Electric by AT&T, divestiture by

Western Electric of some of its manufacturing and other assets, and divestiture by AT&T of some or all of its "Long Lines Department" from some or all of the Bell Operating Companies.

The defendants did not move to dismiss the complaint but in their answer to the complaint, they alleged the following affirmative defenses: (1) plaintiff fails to state a claim upon which relief can be granted; (2) the Court lacks subject matter jurisdiction; and (3) the matters sought to be litigated herein were previously litigated in a suit between the parties brought in 1949 in the United States District Court for the District of New Jersey, Civil Action No. 17-49, making the issues herein *res judicata*, and (4) that in the 1956 consent decree terminating Civil Action No. 17-49, the District Court of New Jersey retained exclusive jurisdiction to modify or terminate that decree.[1]

At a hearing on discovery motions held February 20, 1975, the Court indicated its concern over whether the jurisdictional defenses raised in the answer to the complaint were threshold matters which should be resolved before the expensive and protracted discovery inherent in the nature of this case was undertaken by the parties. The Court then *sua sponte* stayed discovery pending its determination of the jurisdictional questions.

Following extensive briefing and a hearing on July 23, 1975, the Court, on August 5, 1975, invited the Federal Communications Commission (Commission) to participate as *amicus curiae*. The Commission accepted the Court's invitation, submitting an *amicus curiae* brief addressing the jurisdictional issues. Subsequent to the Commission's sub-

[1] By Order dated October 1, 1976, this Court determined: (1) that this action is not barred by the doctrine of *res judicata* because of Civil Action No. 17-49 in the United States District Court for the District of New Jersey; and (2) that the consent decree entered in Civil Action No. 17-49 does not require this Court to relinquish jurisdiction to the New Jersey Court.

mission, supplemental memoranda were filed by the Department of Justice and the defendants.

Meanwhile, the Commission was engaged in various proceedings and made certain determinations which, it appeared to the Court, embraced some of the same 30 alleged actions and practices pinpointed in Addendum B to the Commission's *amicus* memorandum which it viewed as the basis of plaintiff's Sherman Act monopolization charges.

In light of the *amicus* submissions, and the recent proceedings and determinations by the Commission, the Court, by Order dated October 1, 1976, ordered a further hearing on whether the Federal Communications Act of 1934, 47 U.S.C. § 151, *et seq.* (the Communications Act), and the regulations promulgated pursuant thereto, compelled the conclusion that there was an implied repeal of the antitrust laws. Also included, of necessity, was further consideration of the extent to which exclusive jurisdiction rested with the Commission, and whether and to what extent the doctrine of primary jurisdiction should be invoked. Supplemental memoranda were filed by the parties and the Commission, and a hearing held November 16, 1976.

Briefly stated, defendants contend they enjoy implied immunity from antitrust liability because they are subject to a pervasive scheme of regulation imposed by the Federal Communications Act and state regulatory statutes. They contend that this pervasive regulatory scheme, based as it is upon the public interest standard, is flatly inconsistent with the competition standards underlying antitrust law. With respect to the question of primary jurisdiction, defendants contend that because the Court has no antitrust jurisdiction herein, the question of primary jurisdiction cannot arise, and would not be an appropriate exercise of discretion in this case. Recent Commission decisions, they assert, represent primarily, attempts by the Commission to control anticompetitive behavior initiated by defendants through tariff filings.

Plaintiff contends that Congressional intent is the standard to be applied, and that in this case, neither an express, nor an implied immunity from antitrust liability was intended nor exists. Plaintiff sees absolutely no irreconcilable conflict arising under the Communications Act and the Sherman Act, and contends that the Commission's regulations and recent decisions in proceedings do not in any way affect the statutory scheme, or the antitrust jurisdiction of this Court.

The Commission, as *amicus,* finds no blanket immunity from antitrust liability. It does, however, assert that the following three areas are impliedly delegated to the Commission's exclusive jurisdiction which antitrust courts should not disturb by *ad hoc* rulings: (1) in view of Section 214 of the Act, only the Commission may require, through its certification process, entry into or exit from a communications common carrier market; (2) in view of Section 201 of the Act, antitrust courts should not countermand Commission orders requiring carriers to interconnect their telephone systems; and (3) in view of Section 205 of the Act, courts should not base antitrust relief or remedies upon tariff provisions or conduct pursuant to tariff provisions which the Commission has either "approved or prescribed" after the required investigation.

The Commission urges the Court to refer unsettled issues which may substantially affect the Commission's regulatory policies to the Commission under the doctrine of primary jurisdiction and to take judicial notice where the Commission has settled such questions, so as to reconcile the regulatory scheme and the scheme of the antitrust laws.

II.

The Federal Communications Act of 1934 contains no express statement of immunity and defendants do not claim the Act expressly exempts them from the antitrust laws. Therefore, immunity, if it exists, must be implied from

the statutory scheme and the regulatory powers exercised by the Commission.

When faced with implied immunity questions, the courts have undertaken a case-by-case approach which analyzes the particular industry, the applicable regulatory scheme and procedures, and the statutory history to determine whether operation of the antitrust laws can be reconciled with the regulatory scheme. Where reconciliation cannot be achieved, the antitrust laws must give way.

When Congress passed the Communications Act in 1934, it was well aware of the dominance of AT&T of the telecommunications industry inasmuch as AT&T *was* the telecommunications industry.[2] Provisions of older interstate commerce acts were retained, and new provisions incorporated. The stated purpose of the Communications Act is

> ". . . to make available, so far as possible, to all people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, . . ." 47 U.S.C. § 151.

Common carriers are regulated under Title II of the Communications Act, 47 U.S.C. §§ 201-223. The Commission summarizes its mission with respect to common carriers as follows: "(1) to create and maintain a rapid, efficient communications network; (2) to ensure that adequate facilities are provided for the network; and (3) to require the provision of service pursuant to tariffs offering just and reasonable rates, practices, procedures and regulations."[3] Additionally, the Commission has been granted remedial powers sufficient to ensure compliance with its mandate.

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[2] Emphasis added.

[3] Memorandum of Federal Communications Commission as *Amicus Curiae*, at 8.

Title II of the Communications Act creates a scheme embodying extensive regulatory control. *United States* v. *Radio Corporation of America*, 358 U.S. 334, 349 (1959). However, nothing in the history of federal regulation of the telecommunications industry, beginning with the Mann-Elkins Act of June 18, 1910, 36 Stat. 539, and the Willis-Graham Act of 1921, 42 Stat. 27, and continuing through the Communications Act of 1934, including its legislative history, compels the conclusion that Congress envisioned immunity from antitrust liability.

Such immunity may, however, still be implied if an irreconcilable conflict between the regulatory statute and the antitrust laws exists. It is upon this theory that defendants chiefly rely. In their view, pervasive regulation by federal and state agencies automatically confers antitrust immunity. Alternative grounds supporting their contention of immunity are based on asserted inconsistent standards embodied within the regulatory scheme and antitrust laws.

The Supreme Court has addressed the issue of implied immunity from antitrust laws on a number of occasions. At the heart of each of the Supreme Court's decisions involving implied immunity from antitrust laws is a strong disfavor to find that the regulatory scheme completely displaces antitrust laws. *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296 (1963); *Hughes Tool Co.* v. *Trans World Airlines*, 409 U.S. 363 (1973). This basic principle is particularly true where commercial relationships "are governed in the first instance by business judgment and not regulatory coercion." *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 374 (1973).

The *Otter Tail* Court held that the power company, although subject to extensive regulation by the Federal Power Commission, was not immune from antitrust action under Section 2 of the Sherman Act. Quoting from *United*

States v. *Philadelphia National Bank*, 374 U.S. 321, 350-51 (1973), the Court emphasized that

> "[r]epeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust provisions and regulatory provisions." *Otter Tail Power Co.* v. *United States, supra* at 372.

The Court then went on to observe that "activities which come under the jurisdiction of a regulatory agency nevertheless may be subject to scrutiny under the antitrust laws." *Id.*

It is true that a regulatory scheme may be so pervasive that it must displace the antitrust laws in particular and discrete instances. *United States* v. *National Association of Securities Dealers, Inc.*, 422 U.S. 694, 735 (1975). In each instance, however, the concern has been whether different and potentially conflicting standards with respect to particularized activities and conduct may result, thereby threatening the agency's ability to carry-out its regulatory mandate. Immunity is to be implied only where it is necessary to make the regulatory statutes work, and even then only to the minimum extent necessary. *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 357 (1963).

These basic axioms of construction were recently reaffirmed in *Gordon* v. *New York Stock Exchange, Inc.*, 422 U.S. 659, 682-683 (1975), and *United States* v. *National Association of Securities Dealers, Inc.*, 422 U.S. 694, 719-720 (1975).

Merely because Congress has authorized the Commission to regulate the telecommunications industry (even assuming that regulation is viewed as being pervasive) does not automatically necessitate the conclusion that the antitrust laws are to be displaced. As Mr. Justice Harlan observed in his concurring opinion in *United States* v. *Radio Corporation of America, supra* at 353:

> ". . . a Commission determination of 'public interest, convenience, and necessity' cannot either constitute a binding adjudication upon any antitrust issues that may be involved in the Commission's proceeding or serve to exempt a licensee *pro tanto* from the antitrust laws, . . ."

The Court therefore concludes that the Communications Act does not expressly, or impliedly, repeal the antitrust laws. Neither the language, nor the legislative history of the Communications Act supports the conclusion that Congress intended by that Act to grant a total, blanket immunity to defendants from application of antitrust laws, and to place exclusive jurisdiction over all their conduct in the Federal Communications Commission.

The Court further concludes that neither the Act, nor the regulations promulgated pursuant thereto, nor the recent proceedings and determinations by the Commission necessitate or support the conclusion that there has been an implied repeal of the antitrust laws with respect to all of the conduct of defendants embraced within the complaint. The Court is satisfied that it has antitrust jurisdiction of at least some of the aspects of the case.

III.

Having determined the defendants are not completely immune from the antitrust laws, the Court turns next to the applicability of referral to the Commission under the doctrine of primary jurisdiction.

Primary jurisdiction issues arise in antitrust litigation where, as here, "conduct seemingly within the reach of the antitrust laws is also at least arguably protected or prohibited by another regulatory statute enacted by Congress." *Ricci* v. *Chicago Mercantile Exchange*, 409 U.S. 289, 299-300 (1973).

The procedure typically followed is for the antitrust court to refer preliminary factual and legal questions to the agency while retaining ultimate jurisdiction and "the final authority to expound the statute." *Ricci, supra* at 305, quoting from *Federal Maritime Board* v. *Isbrandtsen, Co.*, 356 U.S. 481, 498 (1958). The question of immunity, of course, is not before the agency.

This "prior resort" approach is grounded on the necessity for administrative uniformity and the need for administrative skills found within the appropriate body of experts in handling intricate facts, *United States* v. *Radio Corporation of America, supra* at 346, and grows out of the need to resolve possible conflicts between the antitrust policy of free competition and the regulatory standards. In this case, the regulatory standard is the public interest, convenience and necessity. 47 U.S.C. § 201, 214. However, competition is, without a doubt, a factor to be weighed in determining where the public interest lies. *Hawaiian Telephone Company* v. *F.C.C.*, 498 F.2d 771, 776 (D.C. Cir. 1974).

Referrals have been used in the past in antitrust suits dealing with communications common carriers as the means of accommodating the overlapping jurisdictions.[4] See, *e.g.*, *United States* v. *Radio Corporation of America, supra; Carter* v. *AT&T*, 365 F.2d 486 (5th Cir. 1966); *Chastain* v. *AT&T*, 401 F. Supp. 151 (D.D.C. 1975).

As Judge Gasch observed in the *Chastain* case:

> "The purpose of referrals to regulatory agencies pursuant to the doctrine of primary jurisdiction is simply to give the relevant regulatory agency the opportunity to determine the reasonableness and

[4] The Commission has encouraged the Court to utilize the procedure by means of a precise referral order calling upon the agency to address specific questions under the Communications Act. Supplemental Memorandum of F.C.C. as *Amicus Curiae*, at 5.

> validity of the challenged practice under the regulatory scheme before the Court determines the reasonableness and validity of the practice under the antitrust laws. In this way the primary jurisdiction doctrine seeks to prevent 'sporadic action by federal courts . . . [from] disrupt[ing] an agency's delicate regulatory scheme.'" *Chastain* v. *AT&T*, *supra* at 157, quoting from *United States* v. *Radio Corporation of America, supra* at 348.

Moreover, when certain basic communications issues arise in antitrust proceedings, the regulatory scheme prescribed in Title II of the Communications Act for common carriers would seemingly make referral to the Federal Communications Commission imperative. *Carter* v. *AT&T*, *supra* at 498-499.

Accordingly, it appears to the Court, based upon all of the matters that have come before it, including recent Commission activities, that some—or much—of the conduct and practices of defendants upon which plaintiff bases its charges of conspiracy to monopolize, attempts to monopolize and monopolization might well be subject to the doctrine of primary jurisdiction. The Court, in its discretion, will in the future, consider referring particular issues to the Commission at the appropriate time. At this stage in the proceedings, however, the issues must be more sharply defined through discovery and other proceedings permissible under the Federal Rules of Civil Procedure.

IV.

Defendants, in their answer to the complaint, asserted that the complaint fails to state a claim upon which relief can be granted. With respect to the argument that the complaint is vague, the Court agrees that it is vague. However, the failure of the complaint to set forth specific acts to support its general allegations of antitrust juris-

diction is not sufficient grounds for dismissal since the Federal Rules of Civil Procedure do not require a complainant to set out in detail all of the facts upon which he bases complaint. *Conley* v. *Gibson*, 355 U.S. 41 (1957).

The Rules also provide for a more definite statement, discovery proceedings, depositions, and other pretrial procedures, all of which can add content to the complaint. The Court notes that already allegations of more specific conduct and activity on the part of defendants have surfaced in plaintiff's various memoranda.

V.

In summary, inasmuch as neither party has made a motion raising the jurisdictional issues, the Court, *sua sponte*, finds and orders: (1) that defendants do not have blanket immunity from antitrust liability, either expressly or by implication; (2) that the Court has antitrust jurisdiction in this case; and (3) that should it become necessary in the course of these proceedings, the Court will consider the appropriateness of referring certain issues to the Federal Communications Commission under the doctrine of primary jurisdiction.

These determinations and orders shall govern the future course of this litigation unless subsequently changed by order of the Court.

/s/ JOSEPH C. WADDY
Joseph C. Waddy
United States District Judge

Dated: November 24, 1976

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 74-1698

UNITED STATES OF AMERICA, *Plaintiff*,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY; WESTERN ELECTRIC COMPANY, INC.; and BELL TELEPHONE LABORATORIES, INC., *Defendants*.

(Filed December 22, 1976)

Order

The Court having fully considered defendants' Motion to Dismiss the Complaint in this case filed on December 22, 1976, it is by the Court this 22nd day of December, 1976,

ORDERED that Defendants' Motion to Dismiss is denied for the reasons set forth in the MEMORANDUM OPINION AND ORDER ON JURISDICTIONAL ISSUES, entered by the Court on November 24, 1976.

/s/ JOSEPH C. WADDY
Joseph C. Waddy
United States District Judge

APPENDIX D

Statutory Provisions Involved

Sherman Act

Section 2 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. § 2, provides in pertinent part:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, . . .

Communications Act of 1934

Title I, Sections 1, 2, 3 and 4 of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. §§ 151, 152, 153, 154, provides in pertinent part:

Sec. 1. Purposes of Act; creation of Federal Communications Commission

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the "Federal Communications Commission," which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act.

Sec. 2. Application of Act

(a) The provisions of this Act shall apply to all interstate and foreign communication by wire or radio

and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; . . .

(b) Subject to the provisions of section 301, nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, or (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (3) any carrier engaged in interstate or foreign communication solely through connection by radio, or by wire and radio, with facilities, located in an adjoining State or in Canada or Mexico (where they adjoin the State in which the carrier is doing business), of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (4) any carrier to which clause (2) or clause (3) would be applicable except for furnishing interstate mobile radio communication service or radio communication service to mobile stations on land vehicles in Canada or Mexico; except that sections 201 through 205 of this Act, both inclusive, shall, except as otherwise provided therein, apply to carriers described in clauses (2), (3), and (4).

Sec. 3. Definitions

For the purposes of this Act, unless the context otherwise requires—

(a) "Wire communication" or "communication by wire" means the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire,

cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

(b) "Radio communication" or "communication by radio" means the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

. . .

(e) "Interstate communication" or "interstate transmission" means communication or transmission (1) from any State, Territory, or possession of the United States (other than the Canal Zone), or the District of Columbia, to any other State, Territory, or possession of the United States (other than the Canal Zone), or the District of Columbia, (2) from or to the United States to or from the Canal Zone, insofar as such communication or transmission takes place within the United States, or (3) between points within the United States but through a foreign country; but shall not, with respect to the provisions of title II of this Act (other than section 223 thereof) include wire or radio communication between points in the same State, Territory, or possession of the United States, or the District of Columbia, through any place outside thereof, if such communications is regulated by a State commission.

. . .

(h) "Common carrier" or "carrier" means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this Act; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.

. . .

(t) "State commission" means the commission, board, or official (by whatever name designated) which under the laws of any State has regulatory jurisdiction with respect to intrastate operations of carriers.

. . .

Sec. 4. Provisions relating to the Commission

. . .

(i) The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.

(j) The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. No commissioner shall participate in any hearing or proceeding in which he has a pecuniary interest. Any party may appear before the Commission and be heard in person or by attorney. . . .

. . .

Title II, Sections 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 213, 214, 215, 218, 219, 220 and 221 of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. §§ 201-211, 213-215, 218-221, provides in pertinent part:

Sec. 201. Service and charges

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful . . .

Sec. 202. Discriminations and preferences

(a) It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

(b) Charges or services, whenever referred to in this Act include charges for, or services in connection with, the use of common carrier lines of communication, whether derived from wire or radio facilities, in chain broadcasting or incidental to radio communication of any kind.

(c) Any carrier who knowingly violates the provisions of this section shall forfeit to the United States the sum of $500 for each such offense and $25 for each and every day of the continuance of such offense.

Sec. 203. Schedules of charges; filing with Commission; changes in schedules; overcharges and rebates; penalty for violations

(a) Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers or points on the system of any other carrier subject to this Act when a through route has been established, whether such charges are joint or separate, and showing the classifications, practices, and regulations affecting such charges. Such schedules shall contain such other information, and be printed in such form, and be posted and kept open for public inspection in such places, as the Commission may by regulation re-

quire, and each such schedule shall give notice of its effective date; and such common carrier shall furnish such schedules to each of its connecting carriers, and such connecting carriers shall keep such schedules open for inspection in such public places as the Commission may require.

(b) (1) No change shall be made in the charges, classifications, regulations, or practices which have been so filed and published except after ninety days notice to the Commission and to the public, which shall be published in such form and contain such information as the Commission may by regulations prescribe.

(2) The Commission may, in its discretion and for good cause shown, modify any requirement made by or under the authority of this section either in particular instances or by a general order applicable to special circumstances or conditions except that the Commission may not require the notice period specified in paragraph (1) to be more than ninety days.

(c) No carrier, unless otherwise provided by or under authority of this Act, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this Act and with the regulations made thereunder; and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities, in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.

(d) The Commission may reject and refuse to file any schedule entered for filing which does not provide and give lawful notice of its effective date. Any schedule so rejected by the Commission shall be void and its use shall be unlawful.

(e) In case of failure or refusal on the part of any carrier to comply with the provisions of this section or

of any regulation or order made by the Commission thereunder, such carrier shall forfeit to the United States the sum of $500 for each such offense, and $25 for each and every day of the continuance of such offense.

Sec. 204. Hearings on new charges; suspension pending hearing; refunds

(a) Whenever there is filed with the Commission any new or revised charge, classification, regulation, or practice, the Commission may either upon complaint or upon its own initiative without complaint, upon reasonable notice, enter upon a hearing concerning the lawfulness thereof; and pending such hearing and the decision thereon the Commission, upon delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such charge, classification, regulation, or practice, in whole or in part, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearing the Commission may make such order with reference thereto as would be proper in a proceeding initiated after such charge, classification, regulation, or practice had become effective. If the proceeding has not been concluded and an order made within the period of the suspension, the proposed new or revised charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed charge for a new service or an increased charge, the Commission may by order require the interested carrier or carriers to keep accurate account of all amounts received by reason of such charge for a new service or increased charge, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such charge for a new service or increased charges as by its decision shall be found not justified. At any hearing involving a charge increased, or sought to be increased, the burden of proof to show that the increased charge, or

proposed charge, is just and reasonable shall be upon the carrier, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

(b) Notwithstanding the provisions of subsection (a) of this section, the Commission may allow part of a charge, classification, regulation, or practice to go into effect, based upon a written showing by the carrier or carriers affected, and an opportunity for written comment thereon by affected persons, that such partial authorization is just, fair, and reasonable. Additionally, or in combination with a partial authorization, the commission, upon a similar showing, may allow all or part of a charge, classification, regulation, or practice to go into effect on a temporary basis pending further order of the Commission. Authorizations of temporary new or increased charges may include an accounting order of the type provided for in subsection (a) of this section.

Sec. 205. Commission authorized to prescribe just and reasonable charges; penalties for violations

(a) Whenever, after full opportunity for hearing, upon a complaint or under an order for investigation and hearing made by the Commission on its own initiative, the Commission shall be of opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this Act, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or the maximum or minimum, or maximum and minimum, charge or charges to be thereafter observed, and what classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent that the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any charge other than the charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the

classification and shall conform to and observe the regulation or practice so prescribed.

(b) Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them, who knowingly fails or neglects to obey any order made under the provisions of this section shall forfeit to the United States the sum of $1,000 for each offense. Every distinct violation shall be a separate offense, and in case of continuing violation each day shall be deemed a separate offense.

Sec. 206. Carriers' liability for damages

In case any common carrier shall do, or cause or permit to be done, any act, matter, or thing in this Act prohibited or declared to be unlawful, or shall omit to do any act, matter or thing in this Act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this Act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

Sec. 207. Recovery of damages

Any person claiming to be damaged by any common carrier subject to the provisions of this Act may either make complaint to the Commission as hereinafter provided for, or may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this Act, in any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both such remedies.

Sec. 208. Complaints to Commission; investigations

Any person, any body politic or municipal organization, or State commission, complaining of anything done or omitted to be done by any common carrier subject to this Act, in contravention of the provisions thereof, may apply to said Commission by petition which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been caused, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

Sec. 209. Orders for payment of money

If, after hearing on a complaint, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this Act, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

Sec. 210. Franks and passes; free service to governmental agencies in connection with national defense

. . .

(b) Nothing in this Act or in any other provision of law shall be construed to prohibit common carriers from rendering to any agency of the Government free service in connection with the preparation for the national defense: *Provided,* That such free service may be rendered only in accordance with such rules and regulations as the Commission may prescribe therefor.

Sec. 211. Contracts of carriers; filing with Commission

(a) Every carrier subject to this Act shall file with the Commission copies of all contracts, agreements, or arrangements with other carriers, or with

common carriers not subject to the provisions of this Act, in relation to any traffic affected by the provisions of this Act to which it may be a party.

(b) The Commission shall have authority to require the filing of any other contracts of any carrier, and shall also have authority to exempt any carrier from submitting copies of such minor contracts as the Commission may determine.

Sec. 213. Valuation of property of carrier

(a) The Commission may from time to time, as may be necessary for the proper administration of this Act, and after opportunity for hearing, make a valuation of all or of any part of the property owned or used by any carrier subject to this Act, as of such date as the Commission may fix.

(b) The Commission may at any time require any such carrier to file with the Commission an inventory of all or of any part of the property owned or used by said carrier, which inventory shall show the units of said property classified in such detail, and in such manner, as the Commission shall direct, and shall show the estimated cost of reproduction new of said units, and their reproduction cost new less depreciation, as of such date as the Commission may direct; and such carrier shall file such inventory within such reasonable time as the Commission by order shall require.

(c) The Commission may at any time require any such carrier to file with the Commission a statement showing the original cost at the time of dedication to the public use of all or of any part of the property owned or used by said carrier. For the showing of such original cost said property shall be classified, and the original cost shall be defined, in such manner as the Commission may prescribe; and if any part of such cost cannot be determined from accounting or other records, the portion of the property for which such cost cannot be determined shall be reported to the Commission; and, if the Commission shall so direct, the original cost thereof shall be estimated in such manner as the Commission may prescribe. If the carrier

owning the property at the time such original cost is reported shall have paid more or less than the original cost to acquire the same, the amount of such cost of acquisition, and any facts which the Commission may require in connection therewith, shall be reported with such original cost. The report made by a carrier under this subsection shall show the source or sources from which the original cost reported was obtained, and such other information as to the manner in which the report was prepared, as the Commission shall require.

(d) Nothing shall be included in the original cost reported for the property of any carrier under subsection (c) of this section on account of any easement, license, or franchise granted by the United States or by any State or political subdivision thereof, beyond the reasonable necessary expense lawfully incurred in obtaining such easement, license, or franchise from the public authority aforesaid, which expense shall be reported separately from all other costs in such detail as the Commission may require; and nothing shall be included in any valuation of the property of any carrier made by the Commission on account of any such easement, license, or franchise, beyond such reasonable necessary expense lawfully incurred as aforesaid.

(e) The Commission shall keep itself informed of all new construction, extensions, improvements, retirements, or other changes in the condition, quantity, use, and classification of the property of common carriers, and of the cost of all additions and betterments thereto and of all changes in the investment therein, and may keep itself informed of current changes in costs and values of carrier properties.

(f) For the purpose of enabling the Commission to make a valuation of any of the property of any such carrier, or to find the original cost of such property, or to find any other facts concerning the same which are required for use by the Commission, it shall be the duty of each such carrier to furnish to the Commission, within such reasonable time as the Commission may order, any information with respect thereto which the Commission may by order require, including

copies of maps, contracts, reports of engineers, and other data, records, and papers, and to grant to all agents of the Commission free access to its property and its accounts, records, and memoranda whenever and wherever requested by any such duly authorized agent, and to cooperate with and aid the Commission in the work of making any such valuation or finding in such manner and to such extent as the Commission may require and direct, and all rules and regulations made by the Commission for the purpose of administering this section shall have the full force and effect of law. Unless otherwise ordered by the Commission, with the reasons therefor, the records and data of the Commission shall be open to the inspection and examination of the public. The Commission, in making any such valuation, shall be free to adopt any method of valuation which shall be lawful.

. . .

(h) Nothing in this section shall impair or diminish the powers of any State commission.

Sec. 214. Extension of lines; certificate of public convenience and necessity; discontinuance of service

(a) No carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line: *Provided*, That no such certificate shall be required under this section for the construction, acquisition, or operation of (1) a line within a single State unless such line constitutes part of an interstate line, (2) local, branch, or terminal lines not exceeding ten miles in length, or (3) any line acquired under section 221 or 222 of this title: *Provided further*, That the Commission may, upon appropriate request being made, authorize temporary or emergency service, or the supplementing of existing facilities,

without regard to the provisions of this section. No carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby; except that the Commission may, upon appropriate request being made, authorize temporary or emergency discontinuance, reduction, or impairment of service, without regard to the provisions of this section. As used in this section the term "line" means any channel of communication established by the use of appropriate equipment, other than a channel of communication established by the interconnection of two or more existing channels: *Provided, however*, That nothing in this section shall be construed to require a certificate or other authorization from the Commission for any installation, replacement, or other changes in plant, operation, or equipment, other than new construction, which will not impair the adequacy or quality of service provided.

(b) Upon receipt of an application for any such certificate, the Commission shall cause notice thereof to be given to, and shall cause a copy of such application to be filed with, the Secretary of Defense, the Secretary of State (with respect to such applications involving service to foreign points), and the Governor of each State in which such line is proposed to be constructed, extended, acquired, or operated, or in which such discontinuance, reduction, or impairment of service is proposed, with the right to those notified to be heard; and the Commission may require such published notice as it shall determine.

(c) The Commission shall have power to issue such certificate as applied for, or to refuse to issue it, or to issue it for a portion or portions of a line, or extension thereof, or discontinuance, reduction, or impairment of service, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. After issuance of such certifi-

cate, and not before, the carrier may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, extension, acquisition, operation, or discontinuance, reduction, or impairment of service covered thereby. Any construction, extension, acquisition, operation, discontinuance, reduction, or impairment of service contrary to the provisions of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, the State commission, any State affected, or any party in interest.

(d) The Commission may, after full opportunity for hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier, party to such proceeding, to provide itself with adequate facilities for the expeditious and efficient performance of its service as a common carrier and to extend its line or to establish a public office; but no such authorization or order shall be made unless the Commission finds, as to such provision of facilities, as to such establishment of public offices, or as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier which refuses or neglects, to comply with any order of the Commission made in pursuance of this subsection shall forfeit to the United States $100 for each day during which such refusal or neglect continues.

Sec. 215. Services, equipment, etc.; examination of transactions by Commission

(a) The Commission shall examine into transactions entered into by any common carrier which relate to the furnishing of equipment, supplies, research, services, finances, credit, or personnel to such carrier and/or which may affect the charges made or to be made and/or the services rendered or to be rendered by such carrier, in wire or radio communication subject to this

Act, and shall report to the Congress whether any such transactions have affected or are likely to affect adversely the ability of the carrier to render adequate service to the public, or may result in any undue or unreasonable increase in charges or in the maintenance of undue or unreasonable charges for such service; and in order to fully examine into such transactions the Commission shall have access to and the right of inspection and examination of all accounts, records, and memoranda, including all documents, papers, and correspondence now or hereafter existing, of persons furnishing such equipment, supplies, research, services, finances, credit, or personnel. The Commission shall include in its report its recommendations for necessary legislation in connection with such transactions, and shall report specifically whether in its opinion legislation should be enacted (1) authorizing the Commission to declare any such transactions void or to permit such transactions to be carried out subject to such modification of their terms and conditions as the Commission shall deem desirable in the public interest; and/or (2) subjecting such transaction to the approval of the Commission where the person furnishing or seeking to furnish the equipment, supplies, research, services, finances, credit, or personnel is a person directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier; and/or (3) authorizing the Commission to require that all or any transactions of carriers involving the furnishing of equipment, supplies, research, services, finances, credit, or personnel to such carrier be upon competitive bids on such terms and conditions and subject to such regulations as it shall prescribe as necessary in the public interest.

(b) The Commission shall investigate the methods by which and the extent to which wire telephone companies are furnishing wire telegraph service and wire telegraph companies are furnishing wire telephone service, and shall report its findings to Congress, together with its recommendations as to whether additional legislation on this subject is desirable.

(c) The Commission shall examine all contracts of common carriers subject to this Act which prevent

the other party thereto from dealing with another common carrier subject to this Act, and shall report its findings to Congress, together with its recommendations as to whether additional legislation on this subject is desirable.

Sec. 218. Management of business; inquiries by Commission

The Commission may inquire into the management of the business of all carriers subject to this Act, and shall keep itself informed as to the manner and method in which the same is conducted and as to technical developments and improvements in wire and radio communication and radio transmission of energy to the end that the benefits of new inventions and developments may be made available to the people of the United States. The Commission may obtain from such carriers and from persons directly or indirectly controlling or controlled by, or under direct or indirect common control with, such carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created.

Sec. 219. Reports by carriers; contents and requirements generally

(a) The Commission is authorized to require annual reports from all carriers subject to this Act, and from persons directly or indirectly controlling or controlled by, or under direct or indirect common control with, any such carrier, to prescribe the manner in which such reports shall be made, and to require from such persons specific answers to all questions upon which the Commission may need information. Except as otherwise required by the Commission, such annual reports shall show in detail the amount of capital stock issued, the amount and privileges of each class of stock, the amounts paid therefor, and the manner of payment for the same; the dividends paid and the surplus fund, if any; the number of stockholders (and the names of the thirty largest holders of each class of stock and the amount held by each); the funded and floating debts and the interest paid thereon; the cost and value of the carrier's property, franchises, and equipment; the number of employees and the salaries paid each class; the names of all officers and directors, and the amount of salary, bonus, and all other compensation paid to each; the amounts expended for improvements each year, how expended, and the character of such improvements; the earnings and receipts from each branch of business and from all sources; the operating and other expenses; the balances of profit and loss; and a complete exhibit of the financial operations of the carrier each year, including an annual balance sheet. Such reports shall also contain such information in relation to charges or regulations concerning charges, or agreements, arrangements, or contracts affecting the same, as the Commission may require.

(b) Such reports shall be for such twelve months' period as the Commission shall designate and shall be filed with the Commission at its office in Washington within three months after the close of the year for which the report is made, unless additional time is granted in any case by the Commission; and if any person subject to the provisions of this section shall fail to make and file said annual reports within the time above specified, or within the time extended by the Commission, for making and filing the same, or shall fail to make specific answer to any question authorized by the provisions of this section within thirty days from the time it is lawfully required so to do, such person shall forfeit to the United States the sum of $100 for each and every day it shall continue to be in default with respect thereto. The Commission may by general or special orders require any such carriers to file monthly reports of earnings and expenses and to file periodical and/or special reports concerning any matters with respect to which the Commission is authorized or required by law to act. If any such carrier shall fail to make and file any such periodical or special report within the time fixed by the Commission, it shall be subject to the forfeitures above provided.

Sec. 220. Accounts, records, and memoranda: depreciation charges; forfeitures and penalties

(a) The Commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers subject to this Act, including the accounts, records, and memoranda of the movement of traffic, as well as of the receipts and expenditures of moneys.

(b) The Commission shall, as soon as practicable, prescribe for such carriers the classes of property for which depreciation charges may be properly included under operating expenses, and the percentages of depreciation which shall be charged with respect to each of such classes of property, classifying the carriers as it deems necessary, modify the classes and percentages so prescribed. Such carriers shall not, after the Commission has prescribed the classes of property for which depreciation charges may be included, charge to operating expenses any depreciation charges on classes of property other than those prescribed by the Commission, or, after the Commission has prescribed percentages of depreciation, charge with respect to any class of property a percentage of depreciation other than that prescribed therefor by the Commission. No such carrier shall in any case include in any form under its operating or other expenses any depreciation or other charge or expenditure included elsewhere as a depreciation charge or otherwise under its operating or other expenses.

(c) The Commission shall at all times have access to and the right of inspection and examination of all accounts, records, and memoranda, including all documents, papers, and correspondence now or hereafter existing, and kept or required to be kept by such carrier and the provisions of this section respecting the preservation and destruction of books, papers, and documents shall apply thereto. The burden of proof to justify every accounting entry questioned by the Commission shall be on the person making, authorizing, or

requiring such entry and the Commission may suspend a charge or credit pending submission of proof by such person. Any provision of law prohibiting the disclosure of the contents of messages or communications shall not be deemed to prohibit the disclosure of any matter in accordance with the provisions of this section.

(d) In case of failure or refusal on the part of any such carrier to keep such accounts, records, and memoranda on the books and in the manner prescribed by the Commission, or to submit such accounts, records, memoranda, documents, papers, and correspondence as are kept to the inspection of the Commission or any of its authorized agents, such carrier shall forfeit to the United States the sum of $500 for each day of the continuance of each such offense.

(e) Any person who shall willfully make any false entry in the accounts of any book of accounts or in any record or memoranda kept by any such carrier, or who shall willfully destroy, mutilate, alter, or by any other means or device falsify any such account, record, or memoranda, or who shall willfully neglect or fail to make full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the business of the carrier, shall be deemed guilty of a misdemeanor, and shall be subject, upon conviction, to a fine of not less than $1,000 nor more than $5,000 or imprisonment for a term of not less than one year nor more than three years, or both such fine and imprisonment: *Provided,* That the Commission may in its discretion issue orders specifying such operating, accounting, or financial papers, records, books, blanks, or documents which may, after a reasonable time, be destroyed, and prescribing the length of time such books, papers, or documents shall be preserved.

. . .

(g) After the Commission has prescribed the forms and manner of keeping of accounts, records, and memoranda to be kept by any person as herein provided, it

shall be unlawful for such person to keep any other accounts, records, or memoranda than those so prescribed or such as may be approved by the Commission or to keep the accounts in any other manner than that prescribed or approved by the Commission. Notice of alterations by the Commission in the required manner or form of keeping accounts shall be given to such persons by the Commission at least six months before the same are to take effect.

(h) The Commission may classify carriers subject to this Act and prescribe different requirements under this section for different classes of carriers, and may, if it deems such action consistent with the public interest, except the carriers of any particular class or classes in any State from any of the requirements under this section in cases where such carriers are subject to State commission regulation with respect to matters to which this section relates.

(i) The Commission, before prescribing any requirements as to accounts, records, or memoranda, shall notify each State commission having jurisdiction with respect to any carrier involved, and shall give reasonable opportunity to each such commission to present its views, and shall receive and consider such views and recommendations.

(j) The Commission shall investigate and report to Congress as to the need for legislation to define further or harmonize the powers of the Commission and of State commissions with respect to matters to which this section relates.

Sec. 221. Telephone companies; consolidation; state jurisdiction over services, charges, etc., unaffected; determination of property used in interstate toll service; valuation

(a) Upon application of one or more telephone companies for authority to consolidate their properties or a part thereof into a single company, or for authority for one or more such companies to acquire

the whole or any part of the property of another telephone company or other telephone companies or the control thereof by the purchase of securities or by lease or in any other like manner, when such consolidated company would be subject to this chapter, the Commission shall give reasonable notice in writing to the governor of each of the States in which the physical property affected, or any part thereof, is situated, and to the State commission having jurisdiction over telephone companies, and to such other persons as it may deem advisable, and shall afford all parties a reasonable opportunity to submit comments on the proposal. A public hearing shall be held in all cases where a request therefor is made by a telephone company, an association of telephone companies, a State commission, or local governmental authority. If the Commission finds that the proposed consolidation, acquisition, or control will be of advantage to the persons to whom service is to be rendered and in the public interest, it shall certify to that effect; and thereupon any Act or Acts of Congress making the proposed transaction unlawful shall not apply. Nothing in this subsection shall be construed as in anywise limiting or restricting the powers of the several States to control and regulate telephone companies.

(b) Subject to the provisions of section 301, nothing in this Act shall be construed to apply, or to give the Commission jurisdiction, with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with wire, mobile, or point-to-point radio telephone exchange service, or any combination thereof, even though a portion of such exchange service constitutes interstate or foreign communication, in any case where such matters are subject to regulation by a State commission or by local governmental authority.

(c) For the purpose of administering this Act as to carriers engaged in wire telephone communication, the Commission may classify the property of

any such carrier used for wire telephone communication, and determine what property of said carrier shall be considered as used in interstate or foreign telephone toll service. Such classification shall be made after hearing, upon notice to the carrier, the State commission (or the Governor, if the State has no State commission) of any State in which the property of said carrier is located, and such other persons as the Commission may prescribe.

(d) In making a valuation of the property of any wire telephone carrier the Commission, after making the classification authorized in this section, may in its discretion value only that part of the property of such carrier determined to be used in interstate or foreign telephone toll service.

Sec. 222. Consolidations and mergers of telegraph carriers

. . .

(b) (1) It shall be lawful, upon application to and approval by the Commission as hereinafter provided, for any two or more domestic telegraph carriers to effect a consolidation or merger; and for any domestic telegraph carrier, as a part of any such consolidation or merger or thereafter, to acquire all or any part of the domestic telegraph properties, domestic telegraph facilities, or domestic telegraph operations of any carrier which is not primarily a telegraph carrier: *Provided,* That, except as provided in paragraph (2) of this subsection, no domestic telegraph carrier shall effect a consolidation or merger with any international telegraph carrier, and no international telegraph carrier shall effect a consolidation or merger with any domestic telegraph carrier.

(2) As a part of any such consolidation or merger, or thereafter upon application to and approval by the Commission as hereinafter provided, the consolidated or merged carrier may acquire all or any part of the domestic telegraph properties, domestic telegraph facilities, or domestic telegraph operations of any international telegraph carrier.

(c) (1) Whenever any consolidation or merger is proposed under subsection (b) of this section, the telegraph carrier or telegraph carriers seeking authority therefor shall submit an application to the Commission, and thereupon the Commission shall order a public hearing to be held with respect to such application and shall give reasonable notice thereof, in writing, and an opportunity to be heard, to the Governor of each of the States in which any of the physical property involved in such proposed consolidation or merger is situated, to the Secretary of State, the Secretary of Defense, the Attorney General of the United States, representatives of employees where represented by bargaining representatives known to the Commission, and to such other persons as the Commission may deem advisable. If, after such public hearing, the Commission finds that the proposed consolidation or merger, or an amended proposal for consolidation or merger, (1) is authorized by subsection (a) of this section, (2) conforms to all other applicable provisions of this section, (3) is in the public interest, the Commission shall enter an order approving and authorizing such consolidation or merger, and thereupon any law or laws making consolidations and mergers unlawful shall not apply to the proposed consolidation or merger. In finding whether any proposed consolidation or merger is in the public interest, the Commission shall give due consideration, among other things, to the financial soundness of the carrier resulting from such consolidation or merger.

. . .

Title IV, Sections 401, 403 and 410 of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. §§ 401, 403, 410, provides in pertinent part:

Sec. 401. Enforcement of chapter and orders of Commission; jurisdiction

(a) The district courts of the United States shall have jurisdiction, upon application of the Attorney General of the United States at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions of this Act by any person, to issue a writ or writs of mandamus commanding such person to comply with the provisions of this Act.

(b) If any person fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Commission or any party injured thereby, or the United States, by its Attorney General, may apply to the appropriate district court of the United States for the enforcement of such order. If, after hearing, that court determines that the order was regularly made and duly served, and that the person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person or the officers, agents, or representatives of such person, from further disobedience of such order, or to enjoin upon it or them obedience to the same.

(c) Upon the request of the Commission it shall be the duty of any United States attorney to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States all necessary proceedings for the enforcement of the provisions of this Act and for the punishment of all violations thereof, and the costs and expenses of such prosecutions shall be paid out of the appropriations for the expenses of the courts of the United States.

Sec. 403. Inquiry by Commission on its own motion

The Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which complaint is authorized to be made, to or before the Commission by any provision of this Act, or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act. The Commission shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this Act, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had, excepting orders for the payment of money.

Sec. 410. Use of Joint Boards—Cooperation with State commission.

(a) Except as provided in section 409, the Commission may refer any matter arising in the administration of this Act to a joint board to be composed of a member, or of an equal number of members, as determined by the Commission, from each of the States in which the wire or radio communication affected by or involved in the proceeding takes place or is proposed. For purposes of acting upon such matter any such board shall have all the jurisdiction and powers conferred by law upon an examiner provided for in section 11 of the Administrative Procedure Act, designated by the Commission, and shall be subject to the same duties and obligations. The action of a joint board shall have such force and effect and its proceedings shall be conducted in such manner as the Commission shall by regulations prescribe. The joint board member or members for each State shall be nominated by the State commission of the State or by the Governor if there is no State commission, and appointed by the Federal Communications Commission. The Commission shall have discretion to reject any nominee. Joint board members shall receive such allowances for expenses as the Commission shall provide.

(b) The Commission may confer with any State commission having regulatory jurisdiction with respect to carriers, regarding the relationship between rate structures, accounts, charges, practices, classifications, and regulations of carriers subject to the jurisdiction of such State commission and of the Commission; and the Commission is authorized under such rules and regulations as it shall prescribe to hold joint hearings with any State commission in connection with any matter with respect to which the Commission is authorized to act. The Commission is authorized in the administration of this Act to avail itself of such cooperation, services, records, and facilities as may be afforded by any State commission.

(c) The Commission shall refer any proceeding regarding the jurisdictional separation of common car-

rier property and expenses between interstate and intrastate operations, which it institutes pursuant to a notice of proposed rulemaking and, except as provided in section 409 of this Act, may refer any other matter, relating to common carrier communications of joint Federal-State concern, to a Federal-State Joint Board. The Joint Board shall possess the same jurisdiction, powers, duties, and obligations as a joint board established under subsection (a) of this section, and shall prepare a recommended decision for prompt review and action by the Commission. In addition, the State members of the Joint Board shall sit with the Commission en banc at any oral argument that may be scheduled in the proceeding. The Commission shall also afford the State members of the Joint Board an opportunity to participate in its deliberations, but not vote, when it has under consideration the recommended decision of the Joint Board or any further decisional action that may be required in the proceeding. The Joint Board shall be composed of three Commissioners of the Commission and of four State commissioners nominated by the national organization of the State commissions, as referred to in sections 202(b) and 205(f) of the Interstate Commerce Act, and approved by the Commission. The Chairman of the Commission, or another Commissioner designated by the Commission, shall serve as Chairman of the Joint Board.

All Writs Act

Section 1651 of Title 28, United States Code, 62 Stat 944, as amended, commonly known as the All Writs Act, 28 U.S.C. § 1651, provides in pertinent part:

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law. . . .

State Statutes Regulating Telecommunications Common Carriers

Alabama Code tit. 48, chs. 1, 2, 6.

Arizona Const. art. 15, Arizona Rev. Stat. tit. 42, chs. 1, 2.

Arkansas Stat. Ann. tit. 73, chs. 1, 2, 18.

California Public Utilities Code div. 1, pt. 1, chs. 1-5 (Deering).

Colorado Rev. Stat. tit. 40, arts. 1-7.

Connecticut Gen. Stat. tit. 16, chs. 277, 283.

Delaware Code tit. 26, chs. 1, 9.

Florida Stat. Ann. chs. 350, 363, 364.

Georgia Code Ann. tit. 93, chs. 1-5, 9; tit. 104, ch. 2.

Idaho Code tit. 61, chs. 1-7, 9.

Illinois Rev. Stat. ch. 111⅔, arts. 1-5.

Indiana Code Ann. tit. 8, art. 1, chs. 1, 2, 4, 5, 17, 18, 19 (Burns).

Iowa Code Ann. chs. 488, 490A (West).

Kansas Stat. ch. 66, arts. 66-1, 66-12, 66-14, 66-15.

Kentucky Const. §§ 199-201; Kentucky Rev. Stat. Ann. ch. 278.

Louisiana Civ. Code Ann. tit. 45, chs. 8, 9, pt. 5 (West).

Maine Rev. Stat. tit. 35, pts. 1, 5.

Maryland Ann. Code art. 23, §§ 317-322; art. 78.

Massachusetts Gen. Laws Ann. chs. 159, 166 (West).

Michigan Stat. Ann. tit. 22, chs. 208, 209, 219, §§ 22.1111-22.1113; 225, 226.

Minnesota Stat. ch. 237.

Mississippi Code Ann. tit. 77, chs. 1, 3.

Missouri Rev. Stat. ch. 392.

Montana Rev. Codes tit. 70.

Nebraska Rev. Stat. ch. 75, arts. 1, 6-8.

Nevada Rev. Stat. tit. 58, chs. 703, 704, 707.

New Hampshire Rev. Stat. Ann. chs. 362, 363, 365, 366, 369, 370, 374, 378, 379.

New Jersey Stat. Ann. tit. 48, chs. 2, 3, 17.

New Mexico Const. art. 11, §§ 6-16; New Mexico Stat. Ann. chs. 68, 69, arts. 7, 9, 10.

New York Pub. Serv. Law arts. 1, 5 (McKinney).

North Carolina Gen. Stat. ch. 62, arts. 1-9, 13, 15.

North Dakota Cent. Code tit. 8, chs. 8-10; tit. 49, chs. 49-01 through 49-07, 49-21.

Ohio Rev. Code Ann. tit. 49, chs. 4901, 4903, 4905, 4909, 4931 (Page).

Oklahoma Const. art. 9; Oklahoma Stat. tit. 17, chs. 1, 5, 6, 10, 11; tit. 13, chs. 1, 4.

Oregon Rev. Stat. tit. 57, chs. 756-758.

Pennsylvania Stat. Ann. tit. 66, chs. 4, 7; tit. 15, ch. 13 (Purdon).

Rhode Island Gen. Laws tit. 39, chs. 1-5, 17.

South Carolina Code tit. 58, chs. 1, 2, 5-8.

South Dakota Compiled Laws Ann. tit. 49, chs. 49-1, 49-2, 49-3, 49-6 through 49-14, 49-30, 49-31, 49-32.

Tennessee Code Ann. tit. 65, chs. 1, 2, 4, 5, 21, 30.

Texas Rev. Civ. Stat. Ann. tit. 32, ch. 10, art. 1446c (Vernon, 1976-1977 Supp.).

Utah Code Ann. tit. 54, chs. 1-4.

Vermont Stat. Ann. tit. 30, chs. 1, 5, 7, 71, 73, 75.

Virginia Code Ann. tit. 56, chs. 1-5, 15.

Washington Const. art. 12, § 19; Washington Rev. Code tit. 80, chs. 80.01, 80.04, 80.08, 80.12, 80.16, 80.20, 80.36.

West Virginia Code ch. 24, arts. 1-4.

Wisconsin Stat. tit. 17, chs. 184, 195, 196.

Wyoming Const. art. 10, §§ 7, 12; Wyoming Stat. tit. 37, chs. 1-3.

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 74-1698

UNITED STATES OF AMERICA, *Plaintiff*,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY; WESTERN ELECTRIC COMPANY, INC.; AND BELL TELEPHONE LABORATORIES, INC., *Defendants*.

Antitrust Equitable Relief Sought

Filed: November 20, 1974

Complaint

The United States of America, plaintiff, by its attorneys, acting under the direction of the Attorney General of the United States, brings this civil action to obtain equitable relief against the defendants named herein, and complains and alleges as follows:

I.

JURISDICTION AND VENUE

1. This complaint is filed and this action is instituted under Section 4 of the Act of Congress of July 2, 1890, as amended (15 U.S.C. § 4), commonly known as the Sherman Act, in order to prevent and restrain the continuing violations by the defendants, as hereinafter alleged, of Section 2 of the Sherman Act (15 U.S.C. § 2).

2. Defendants American Telephone and Telegraph Company and Western Electric Company, Inc. transact business and are found within the District of Columbia.

II.

THE DEFENDANTS

3. American Telephone and Telegraph Company (hereinafter referred to as "AT&T") is made a defendant herein. AT&T is a corporation organized and existing under the laws of the State of New York, with its principal place of business in New York, New York. AT&T, directly and through subsidiaries, is engaged in providing telecommunications service and in the manufacture of telecommunications equipment.

4. Western Electric Company, Inc. (hereinafter referred to as "Western Electric") is made a defendant herein. Western Electric is a corporation organized and existing under the laws of the State of New York, with its principal place of business in New York, New York. Western Electric is engaged, directly and through subsidiaries, in the manufacture and supply of telecommunications equipment. Western Electric is a wholly-owned subsidiary of AT&T.

5. Bell Telephone Laboratories, Inc. (hereinafter referred to as "Bell Labs") is made a defendant herein. Bell Labs is a corporation organized and existing under the laws of the State of New York, with its principal place of business in Murray Hill, New Jersey. Bell Labs is engaged in telecommunications research, development and design work. Bell Labs is owned jointly by AT&T and Western Electric.

III.

CO-CONSPIRATORS

6. Various other persons, firms and corporations not made defendants herein have participated as co-conspirators with the defendants in the violations hereinafter alleged and have performed acts and made statements in

furtherance thereof. Said co-conspirators include, but are not limited to, the following telephone companies:

Name of Corporation	Percentage of Voting Shares Owned by AT&T	Area Served
New England Telephone & Telegraph Company	85.4	Maine, Massachusetts, New Hampshire, Rhode Island, Vermont
The Southern New England Telephone Company	17.1	Connecticut
New York Telephone Company	100.0	New York, Connecticut
New Jersey Bell Telephone Company	100.0	New Jersey
The Bell Telephone Company of Pennsylvania	100.0	Pennsylvania
The Diamond State Telephone Company	100.0	Delaware
The Chesapeake and Potomac Telephone Company	100.0	Washington, D.C.
The Chesapeake and Potomac Telephone Company of Maryland	100.0	Maryland
The Chesapeake and Potomac Telephone Company of Virginia	100.0	Virginia
The Chesapeake and Potomac Telephone Company of West Virginia	100.0	West Virginia
Southern Bell Telephone and Telegraph Company	100.0	Florida, Georgia, North Carolina, South Carolina

Name of Corporation	Percentage of Voting Shares Owned by AT&T	Area Served
South Central Bell Telephone Company	100.0	Alabama, Kentucky, Louisiana, Mississippi, Tennessee
The Ohio Bell Telephone Company	100.0	Ohio
Cincinnati Bell Inc.	25.7	Ohio, Kentucky, Indiana
Michigan Bell Telephone Company	100.0	Michigan
Indiana Bell Telephone Company, Incorporated	100.0	Indiana
Wisconsin Telephone Company	100.0	Wisconsin
Illinois Bell Telephone Company	100.0	Illinois, Indiana
Northwestern Bell Telephone Company	100.0	Iowa, Minnesota, Nebraska, North Dakota, South Dakota
Southwestern Bell Telephone Company	100.0	Arkansas, Kansas, Missouri, Oklahoma, Texas, Illinois
The Mountain States Telephone and Telegraph Company	87.8	Arizona, Colorado, Idaho, Montana, New Mexico, Utah, Wyoming, Texas
Pacific Northwest Bell Telephone Company	89.2	Oregon, Washington, Idaho
The Pacific Telephone & Telegraph Company	89.7	California, Nevada

IV.

Definitions

7. As used herein:

(a) "Bell Operating Companies" shall mean the companies listed in paragraph 6 above, and their subsidiaries.

(b) "Bell System" shall mean AT&T and the Bell Operating Companies.

(c) "Independent telephone companies" shall mean all telephone operating companies in the United States except the Bell Operating Companies.

V.

Trade and Commerce

8. Telecommunications consists of the electronic and electromagnetic transmission of voice, data and other communications by wire, cable, microwave radio and communications satellite.

9. Telephone communication is the most common form of telecommunications service. Telephone service permits voice telephone communication between subscribers, and includes, among other services, local exchange service for telephone calls between subscribers located within the same local telephone exchange area and long distance or "message toll service" for telephone calls between subscribers located in different exchange areas.

10. Local exchange service is provided by connecting all subscribers in the same local exchange area through one or more central offices. Typically, wire pairs connect each subscriber to telephone company central office switching facilities in that exchange area.

11. Message toll service is provided by connecting central offices in different local exchange areas. The connection of these local exchange areas, through trunk lines and toll switching offices, permits long distance telephone service throughout the United States. Message toll service typically involves the transmission of telecommunications via microwave radio or coaxial cable between local telephone exchanges, with central office switching equipment in each local exchange area providing each subscriber access to the long distance toll network. The long distance toll network is a nationwide web of trunk lines and toll offices linking all of the telephone operating companies in the United States.

12. Telephone service in the United States is provided by the Bell System and by approximately 1,705 independent telephone companies. Telephone operating companies typically contract with subscribers for local exchange service, connecting the subscriber with the telephone company central office. Subscribers typically are charged installation fees and a monthly charge for service. The telephone companies retain title to the equipment installed, and retain control over the equipment after service is terminated.

13. The Bell Operating Companies provide local telephone service in the 48 contiguous states. As of December 31, 1973, the Bell Operating Companies served approximately 113.2 million telephones, or approximately 82 percent of the nation's telephones. Approximately 1,705 independent telephone companies account for the remaining 18 percent of the nation's telephones. The AT&T's Long Lines Department provides interstate telephone service. For the year ending December 31, 1973, more than 90 percent of all interstate telephone calls in the United States were routed in whole or in part over Bell System facilities. In 1973 the Bell System's total revenue from telephone service was approximately $22 billion. The Bell System is by far the largest supplier of telephone service in the United States.

14. In addition to telephone service, telecommunications includes the transmission of data, facsimile, audio and video programming and other specialized forms of telecommunications. Transmission of these specialized telecommunications may be accomplished over the same nationwide switched network which accommodates telephone service, or over private lines.

15. Private line service involves the leasing of telecommunications circuits to subscribers with a high volume of communications requirements between specific locations. Private lines may be used for the transmission of voice, data, audio and video programming and other specialized forms of telecommunications. Private line service may simply connect two points or may be switched between and among multiple points. A private line may be connected with the switched telephone network.

16. The Bell System provides intercity private line service for the transmission of voice, data, facsimile, audio and video programming and other telecommunications. Private line services are also provided by Specialized Common Carriers, Miscellaneous Common Carriers and Domestic Satellite Carriers. Specialized Common Carriers, Miscellaneous Common Carriers and Domestic Satellite Carriers compete with the Bell System in providing private line service. Total revenue from private line service in 1973 was approximately $1.1 billion. In 1973 Bell System revenue from private line service was approximately $1 billion, or approximately 90 percent of total private line revenue. The Bell System is by far the largest supplier of private line service in the United States.

17. Although many organizations with substantial needs for long distance voice and data telecommunications purchase such services on a private line basis, some organizations construct and maintain private systems for the long distance transmission of voice, data and other telecommunications.

18. Land mobile telecommunications consist of paging, dispatch and mobile telephone service provided by radio communication. These services may be interconnected with the nationwide switched telephone system, permitting communication with telephone subscribers on both a local exchange and a message toll basis. Land mobile telecommunications are provided by Radio Common Carriers, independent telephone companies and the Bell Operating Companies.

19. Telecommunications equipment is used to provide telephone service and other telecommunications, and includes terminal equipment, switching equipment and transmission equipment. Terminal equipment is equipment used principally in telecommunications and installed at the premises of the subscriber. Switching equipment is equipment in local exchange central offices and toll offices used to route and switch telecommunications between subscribers. Transmission equipment is used to transmit telecommunications.

20. Until about 1968, telephone operating companies typically prohibited the interconnection of customer provided terminal equipment with telephone company facilities and, with limited exceptions, provided all the terminal equipment located on subscribers' premises. Telephone operating companies were thus the only significant purchasers of telecommunications terminal equipment.

21. Telephone subscribers and other telecommunications customers may provide their own terminal equipment, and need not rely solely on the offerings of telephone operating companies. Customers may obtain terminal equipment from numerous manufacturers and suppliers, known collectively as the "interconnect industry."

22. Western Electric manufactures and supplies telecommunications equipment for the Bell System and is the largest manufacturer of telecommunications equipment in

the United States. Western Electric's subsidiary, Teletype Corporation, manufactures teletypewriters and data transmission equipment. A substantial majority of the telecommunications transmission, switching and terminal equipment used by the Bell System is supplied by Western Electric. Although Western Electric also sells telecomunications equipment to government agencies, it typically does not sell equipment to independent telephone companies or other users of telecommunications equipment. In 1973, Western Electric's sales to the Bell System were $6.2 billion. Western Electric's total sales in 1973 were $7.0 billion. Western Electric is by far the largest supplier, and the Bell System is by far the largest purchaser, of telecommunications equipment in the United States.

23. AT&T provides services to each Bell Operating Company pursuant to agreements known as "License Contracts." Under these agreements AT&T undertakes to maintain arrangements whereby telephones and related equipment may be manufactured under patents owned or controlled by AT&T and may be purchased by each Operating Company for use within a specified territory; to prosecute research in telephony continuously and to make available to the Operating Company benefits derived therefrom; and to furnish advice and assistance with respect to virtually all phases of the Operating Company's business. The License Contracts, or supplementary agreements in the case of four Operating Companies, provide that AT&T will maintain connections between each licensee's telephone system and the systems of the other Bell Operating Companies, and provide for joint use of certain rights-of-way and facilities. Supplementary agreements cover the sharing of revenues derived by AT&T and the Bell Operating Companies from interstate and foreign services.

24. Western Electric manufactures and supplies equipment to AT&T and each Bell Operating Company pursuant to agreements known as "Standard Supply Contracts."

Under these agreements, as supplemented, Western Electric agrees, upon the order of each Operating Company and to the extent reasonably required for the latter's business, to manufacture materials or to purchase and inspect materials manufactured by others and to sell these materials to the Operating Company. Western Electric also agrees to maintain stocks at distribution points, to prepare equipment specifications, to perform installations of materials and to repair, sell or otherwise dispose of used materials. Under each agreement Western Electric's prices and terms are to be as low as to its most favored customers for like materials and services under comparable conditions.

25. Bell Labs conducts telecommunications research and development for Western Electric and the Bell System. Owned jointly by AT&T and Western Electric, Bell Labs' 1974 budget for telecommunications research and development exceed $500 million. Bell Labs maintains its principal laboratories in Murray Hill, Holmdel and Whippany, New Jersey, and Naperville, Illinois, and additional facilities in seven other states. Bell Labs is by far the largest telecommunications research and development facility in the United States.

26. AT&T, directly and through subsidiaries, regularly transmits voice, data and other telecommunications across state lines to customers located throughout the United States. Western Electric, directly and through subsidiaries, manufactures telecommunications equipment at locations in many states and regularly sells and ships such equipment across state lines to customers located throughout the United States. Bell Labs conducts telecommunications research and development at locations in many states and regularly disseminates the results of such research and development to consumers thereof throughout the United States. AT&T, Western Electric and Bell Labs have been and are engaged in interstate commerce.

VI.

Violations Alleged

27. For many years past and continuing up to and including the date of the filing of this complaint, the defendants and co-conspirators have been engaged in an unlawful combination and conspiracy to monopolize, and the defendants have attempted to monopolize and have monopolized, the aforesaid interstate trade and commerce in telecommunications service, and submarkets thereof, and telecommunications equipment, and submarkets thereof, in violation of Section 2 of the Sherman Act. Defendants are continuing and will continue these violations unless the relief hereinafter prayed for is granted.

28. The aforesaid combination and conspiracy to monopolize has consisted of a continuing agreement and concert of action among the defendants and co-conspirators, the substantial terms of which have been and are:

(a) That AT&T shall achieve and maintain control over the operations and policies of Western Electric, Bell Labs and the Bell Operating Companies;

(b) That the defendants and co-conspirators shall attempt to prevent, restrict and eliminate competition from other telecommunications common carriers;

(c) That the defendants and co-conspirators shall attempt to prevent, restrict and eliminate competition from private telecommunications systems;

(d) That Western Electric shall supply the telecommunications equipment requirements of the Bell System;

(e) That defendants and co-conspirators shall attempt to prevent, restrict and eliminate competition from other manufacturers and suppliers of telecommunications equipment.

29. Pursuant to and in effectuation of the aforesaid combination and conspiracy to monopolize, attempt to monopolize and monopolization, the defendants, among other things, have done the following:

(a) attempted to obstruct and obstructed the interconnection of Specialized Common Carriers with the Bell System;

(b) attempted to obstruct and obstructed the interconnection of Miscellaneous Common Carriers with the Bell System;

(c) attempted to obstruct and obstructed the interconnection of Radio Common Carriers with the Bell System;

(d) attempted to obstruct and obstructed the interconnection of Domestic Satellite Carriers with the Bell System;

(e) attempted to obstruct and obstructed the interconnection of customer provided terminal equipment with the Bell System;

(f) refused to sell terminal equipment to subscribers of Bell System telecommunications service;

(g) caused Western Electric to manufacture substantially all of the telecommunications equipment requirements of the Bell System; and

(h) caused the Bell System to purchase substantially all of its telecommunications equipment requirements from Western Electric.

VII.

Effects

30. The aforesaid violations have had the following effects, among others:

(a) Defendants have achieved and maintained a monopoly of telecommunications service, and submarkets thereof, and telecommunications equipment, and submarkets thereof, in the United States;

(b) Actual and potential competition in telecommunications service, and submarkets thereof, and telecommunications equipment, and submarkets thereof, has been restrained and eliminated;

(c) Purchasers of telecommunications service and telecommunications equipment have been denied the benefits of a free and competitive market.

Prayer

Wherefore, Plaintiff Prays:

1. That the Court adjudge and decree that defendants have combined and conspired to monopolize, have attempted to monopolize and have monopolized interstate trade and commerce in telecommunications service, and submarkets thereof, and telecommunications equipment, and submarkets thereof, in violation of Section 2 of the Sherman Act.

2. That each of the defendants, their officers, directors, agents, employees and all persons, firms or corporations acting on behalf of defendants or any one of them be perpetually enjoined from continuing to carry out, directly or indirectly, the aforesaid combination and conspiracy to monopolize, attempt to monopolize and monopolization of the aforesaid interstate trade and commerce in telecommunications service and equipment, and that they be perpetually enjoined from engaging in or participating in practices, contracts, agreements or understandings, or claiming any rights thereunder, having the purpose or effect of continuing, reviving or renewing any of the aforesaid violations or any violations similar thereto.

3. That defendant AT&T be required to divest all of its capital stock interest in Western Electric.

4. That defendant Western Electric be required to divest manufacturing and other assets sufficient to insure competition in the manufacture and sale of telecommunications equipment.

5. That defendant AT&T be required, through divestiture of capital stock interests or other assets, to separate some or all of the Long Lines Department of AT&T from some or all of the Bell Operating Companies, as may be necessary to insure competition in telecommunications service and telecommunications equipment.

6. That pursuant to Section 5 of the Sherman Act the Court order summons to be issued to Bell Telephone Laboratories, Inc. commanding it to appear and answer the allegations contained in this Complaint, and to abide and perform such orders and decrees as the Court may make in the premises.

7. That the plaintiff have such other and further relief as the nature of the case may require and as the Court may deem just and proper.

8. That the plaintiff recover the costs of this action.

/s/ Thomas E. Kauper
Thomas E. Kauper
Assistant Attorney General

/s/ Philip L. Verveer
Philip L. Verveer

/s/ BADDIA J. RASHID
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APPENDIX F

FCC's Analysis of Department of Justice Charges

This addendum lists the 30 alleged actions or practices by the American Telephone & Telegraph Co. on which the Justice Department apparently basis its charges of conspiracy to monopolize. The list is taken from the Department's opening Memorandum of Points and Authorities on jurisdictional issues, pages 9-13. For purposes of the list, which in some cases paraphrases the Department's language, AT&T stands for the defendants collectively.

1. AT&T opposed the establishment of private mobile radio systems, and arbitrarily refused to interconnect [its] local distribution facilities with such systems, thereby preventing access to the telephone network.

2. AT&T opposed the granting of radio frequencies to radio common carriers in an effort to maintain [itself] as the sole provider of mobile radio service to the public in [its] respective areas.

3. AT&T delayed for 12 years before providing the radio common carrier industry interconnection to local telephone exchange facilities.

4. After AT&T reluctantly provided interconnection in 1961, it was permitted only under unreasonably restrictive and discriminatory terms.

5. When a number of firms, including the television networks, attempted to exploit new microwave technology by construction of private microwave communication networks . . ., AT&T began a crash program designed to pre-empt for itself the entire microwave field.

6. When . . . miscellaneous common carriers began providing audio and video transmission for broadcasters, AT&T again employed interconnection restrictions and

other exclusionary measures to limit the competitors' success.

7. AT&T also refused to interconnect its facilities with existing private microwave facilities operated by right-of-way companies (e.g., railroads), thereby limiting the utility of private systems and preserving its virtual monopoly in intercity microwave transmission.

8. Other potential users of private microwave systems sought a portion of the public airwaves for their own use and were again opposed by [AT&T, which] responded with a startling reduction in price which virtually eliminated the incentive for construction and use of private microwave systems.

9. New firms, later to become known as "specialized common carriers," sought over [AT&T's] opposition to enter the intercity private line field in competition with [AT&T which] responded by restricting interconnection with [its] facilities—even though identical interconnection rights were routinely available to . . . AT&T's Long Lines Department.

10. After consuming four years in negotiating contracts covering the local distribution facilities necessary for these new carriers to provide *interstate* service, AT&T broke off negotiations without warning and caused its operating companies to file tariffs with *state* regulatory agencies announcing the terms and conditions under which they would provide the facilities.

11. [AT&T] unreasonably delayed providing intercity communications facilities to the specialized common carriers for several years even though similar facilities were provided to a competing carrier.

12. [AT&T] until 1968 refused to allow interconnection of customer-provided terminal equipment, thereby completely foreclosing competitors' sales of terminal equipment to [AT&T's] subscribers.

13. Since 1969, [AT&T has] allowed interconnection of most terminal equipment manufactured by others only through an "interface device," obtainable only from [AT&T] and for which the subscriber must pay an additional charge.

14. [AT&T has] failed to make these [interface] devices available for certain types of competitive equipment and failed to assure an adequate supply of such devices for other types of competitive equipment. Such devices are often needlessly expensive, often impair the performance of customers' equipment and are often improperly and belatedly installed.

15. [AT&T has] "bundled" charges for terminal equipment and trunk lines, thereby impeding competition.

16. [AT&T has] refused to sell terminal equipment (. . . will only lease equipment), thereby forestalling the development of a secondary market in such equipment and of independent equipment repair and maintenance organizations.

17. [AT&T has] provided certain equipment under termination agreements that impose substantial penalties for early cancellation, thereby insulating such equipment from competition.

18. [AT&T has] pre-announced forthcoming equipment, thereby inhibiting the sale of competitive products.

19. [AT&T has] caused Western Electric to manufacture substantially all of the telecommunicationn equipment requirements of AT&T and the Bell operating companies.

20. AT&T and the Bell operating companies [have purchased] substantially all of their telecommunications equipment requirements from Western Electric.

21. [AT&T has] refrained from purchasing suitable equipment from outside suppliers.

22. [AT&T has] required that the operating companies funnel their outside equipment purchases through Western Electric.

23. [AT&T has] caused Western Electric to copy equipment of other manufacturers for sale to AT&T and the Bell operating companies.

24. [AT&T has] restricted the purchase of competitive equipment until similar equipment was available from Western Electric.

25. [AT&T has] restricted and eliminated the development of alternative local distribution facilities by restricting the use to be made of channels leased to community antenna television ("CATV" or "cable TV") operators and restricting the type of communications permitted on CATV cables attached to [AT&T's] telephone poles.

26. [AT&T has threatened] potential customers of competitors with loss of business from [AT&T] if they purchase from competitors.

27. [AT&T has] refused to sell wiring inside buildings to customers desiring to install their own equipment.

28. [AT&T has] refused interconnection with new independent telephone companies organized to serve new communities.

29. [AT&T has] progressively embraced new telecommunications service and equipment opportunities developed by others.

30. [AT&T has] abused the regulatory process.

APPENDIX G

Bell System Activities Alleged by Government to Be "Beyond the Reach of the Communications Act"

Alleged Activity	FCC Proceeding in Which Allegation Was Made and Jurisdiction Asserted *FCC Proceeding in Which Allegation Could Have Been Made*
1. "Western Electric has copied competitors' products rather than purchase them for resale to the Bell operating companies;"	Docket 19129: Initial Decision ¶¶ 25, 93, 107 n.26, 381; Trial Staff Ex. 297, pp. 66-67.
2. "Western Electric has . . . repurchased equipment from the Bell companies to refurbish or scrap, thereby preventing the development of a secondary equipment market;"	*Docket 19129: Trial Staff Statement of Aug. 29, 1973, pp. 58-60; Bell Ex. 49A, Tab 6.*
3. "Western Electric has . . . denied or delayed certification of equipment not manufactured by it as 'system standard';"	Docket 19129: Initial Decision ¶¶ 48, 93, 378, 416, pp. 534-35; Trial Staff Proposed Finding D383.
4. "Western Electric has . . . marketed its own equipment to the Bell companies prematurely;"	Docket 19129: Initial Decision ¶¶ 378, 428, 588; Trial Staff Proposed Findings D238-39, D346, D395-96.
5. "Western Electric has . . . marketed its own equipment to the Bell companies . . . at unrealistically low prices;"	Docket 19129: Initial Decision ¶¶ 93, 203-24; Trial Staff Proposed Findings C243, C250, C257.
6. "Western Electris has . . . abused its patent portfolio to obtain access to the technology of others;"	Docket 19129: Initial Decision ¶¶ 107 n.26, 673; Trial Staff Statement of Aug. 29, 1973, pp. 62-64; Bell Ex. 49A, Tab. 8.

7. "Western Electric has . . . made available to the Bell operating companies lists of its suppliers to be used for purposes of reciprocity leverage;"	*Docket 19129: Trial Staff Statement of Aug. 29, 1973, pp. 31-32, 34; Transcript 8385-86; Bell Ex. 44, pp. 112-13. Cf. Docket 16679: Decision ¶¶ 13-17; Docket 16828: Decision ¶¶ 48-57.*
8. "Western Electric has . . . failed to maintain and provide sufficient interface devices to the Bell companies, thus preventing prompt installation of competitors' terminal equipment."	Docket 19419: Order of Feb. 3, 1972; Informal Complaint by Essential Communication Systems, Inc., May 1972, FCC Reference 9310. Cf. Docket 19934: Complaint, Aug. 21, 1973; Docket 19528; Docket 20003.
9. "Bell Laboratories has designed and developed Western's 'fighting machines';"	Docket 19129: Initial Decision ¶¶ 205-206, 61, 378, 381; Trial Staff Ex. 297, pp. 55, 64-66; Trial Staff Proposed Finding C244.
10. "Bell Laboratories has . . . resisted and delayed evaluating non-Western equipment as 'Bell System' standard;"	Docket 19129: Initial Decision ¶¶ 48, 93, 378, 416, pp. 534-35; Trial Staff Ex. 297, p. 50; Trial Staff Proposed Findings C108-109, E53.
11. "Bell Laboratories has . . . conducted economic research to provide theoretical defenses for defendants' structure;"	Docket 19129: Trial Staff Statement of Aug. 29, 1973, pp. 13-15; Initial Decision ¶¶ 15, 152; Bell Ex. 7; Docket 20003: First Supplemental Notice, Att. A, Item G.
12. "Bell Laboratories has . . . failed to provide information about the functioning of the telecommunications network to suppliers who wish to make compatible equipment;"	Docket 19129: Initial Decision ¶¶ 404, 414, 475, p. 535; Trial Staff Proposed Findings D307, D309; ITT Proposed Findings 67-69.

13. "Bell Laboratories has . . . performed cost analyses of Western Electric equipment and AT&T services, developing new theories to support unreasonable low prices for equipment and services subject to competition."	Docket 16258: Order of July 29, 1969, ¶ 9; Docket 18128: Decision ¶¶ 1-10; Docket 19129: Initial Decision ¶ 194; Bell Ex. 7; Docket 20003: First Supplemental Notice, Att. A, Item K; Docket 20288: Initial Decision ¶¶ 137-140.
14. "AT&T and the Bell operating companies have refused to purchase equipment from manufacturers other than Western Electric;"	Docket 19129: Initial Decision ¶¶ 46-48, 93, 106-109, 394-414, pp. 534-35; ITT Proposed Findings 31-41; Trial Staff Proposed Findings D313-25.
15. "AT&T and the Bell operating companies have . . . delayed the purchase of needed equipment until Western could produce it;"	Docket 19129: Initial Decision ¶¶ 93, 298, 318-28; Trial Staff Proposed Findings D100-104.
16. "AT&T and the Bell operating companies have . . . used their control of customer billing information to identify customers susceptible to private line competition;"	Docket 18128: Decision ¶ 207; Docket 19919: Interim Decision ¶¶ 56, 75, 76; Docket 20003: First Supplemental Notice, Att. B, Items I, J, N, O; First Report ¶¶ 271, 272, 282; Docket 20288: Datran Proposed Findings 107-16.
17. "AT&T and the Bell operating companies have . . . strategically announced new service offerings to chill the financing of competitors;"	*Docket 20288: Datran Proposed Findings 143-53.*
18. "AT&T and the Bell operating companies have . . . saturated markets with advertising;"	Docket 19129: Initial Decision ¶¶ 976-85, p. 534; Bell Ex. 4, Tab 21; Docket 20288: Datran Proposed Findings 143-53. Cf. Chief Common Carrier Bureau letter to AT&T dated Jan. 15, 1976; AT&T reply dated Apr. 28, 1976.

19. "AT&T and the Bell operating companies have . . . disparaged competitors;"	Docket 19129: Initial Decision ¶¶ 48, 453, 459-60, 468; Docket 20099: Implementation Meetings, Chief Common Carrier Bureau letter to Westinghouse Electric Corporation dated Oct. 31, 1975.
20. "AT&T and the Bell operating companies have . . . excluded competitors from advertising in the Yellow Pages;"	*Docket 20099: Joint Motion of Participants to RCC discussions; Att. E to Memorandum of Understanding.*
21. "AT&T and the Bell operating companies have . . . agreed with other utility companies to fix rates for cable pole attachments;"	*Dockets 16928, 16943, 17098: Decision ¶¶ 1-3; Dockets 17441, 20029, 20191.*
22. "AT&T and the Bell operating companies have . . . threatened customers or potential customers with loss of Bell business if they patronized competitors."	*Docket 19129: Trial Staff Statement of Aug. 29, 1973, pp. 31-32, 34; Transcript 8385-86; Bell Ex. 44, pp 112-13. Cf. Docket 16679: Decision ¶¶ 13-17; Docket 16828: Decision ¶¶ 48-57.*

No. 77-372

In the Supreme Court of the United States

OCTOBER TERM, 1977

AMERICAN TELEPHONE AND TELEGRAPH COMPANY; WESTERN ELECTRIC COMPANY, INC.; AND BELL TELEPHONE LABORATORIES, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI UNDER 28 U.S.C. 1254 TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, AND UNDER 28 U.S.C. 1651(a) TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OCTOBER TERM, 1977

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals denying a common law writ of certiorari under 28 U.S.C. 1651(a) (Pet. App. 1a) is unreported. The opinion and order of the district court (Pet. App. 2a–12a) are reported at 427 F. Supp. 57. The order of the district court

denying petitioners' motion to dismiss the complaint (Pet. App. 13a) is unreported.[1]

JURISDICTION

The order of the court of appeals (Pet. App. 1a) was entered on May 26, 1977, and a petition for rehearing was denied on July 7, 1977. The petition for a writ of certiorari to the court of appeals under 28 U.S.C. 1254, or to the district court under 28 U.S.C. 1651(a) [2] was filed on September 8, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (l) and 28 U.S.C. 1651 (Pet. 1–2).

QUESTIONS PRESENTED

1. Whether in a government civil antitrust case, the court of appeals abused its discretion in denying petitioners' application for a common law writ of certiorari under 28 U.S.C. 1651(a) to review an interlocutory ruling of the district court, that federal and state laws regulating telecommunications service do not confer blanket immunity from the antitrust laws upon the American Telephone and Telegraph Company and its manufacturing and research affiliates ("AT&T"), and that particular questions concerning the primary and exclusive jurisdiction of the Federal Communications Commission over activities of AT&T should be deferred until discovery and refinement of the issues.

[1] This Court's order denying petitioners' earlier motion for leave to file a petition for a writ of certiorari and/or petition for a writ of certiorari before judgment is reported at 429 U.S. 1071.

[2] Petitioners have failed to comply with Rule 31(1) of this Court's Rules, which requires that "[t]he petition in any proceeding seeking the issuance of a writ by this court authorized by 18 U.S.C. § 1651(a) * * * shall be prefaced by a motion for leave to file such petition * * *."

2. Whether this Court should issue a writ of certiorari under 28 U.S.C. 1651(a) to the district court to review its above-described interlocutory ruling.

STATUTES INVOLVED

Section 2 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 2, is set forth at Pet. App. 14a; portions of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. 151 *et seq.*, are set forth at Pet. App. 14a–40a. Section 602(d) of that Act, 48 Stat. 1102, amending Section 11 of the Clayton Act, 38 Stat. 734, as amended, 15 U.S.C. 21, and pertinent provisions of Section 11 are set forth in the Appendix to this brief.

STATEMENT

A. On November 20, 1974, the United States filed a civil antitrust complaint charging petitioners, American Telephone and Telegraph Company ("AT&T"), and its subsidiaries, Western Electric Company and Bell Telephone Laboratories ("Bell Labs"), with violating Section 2 of the Sherman Act by attempting and conspiring to monopolize, and monopolizing telecommunications service and equipment (Pet. App. 44a–58a). The complaint also named as co-conspirators the 23 telephone companies wholly or partially owned by AT&T ("the Bell Operating Companies").[3]

[3] Petitioners and the Bell Operating Companies will sometimes be collectively described herein as AT & T.

B. The complaint alleged that the defendants and co-conspirators had violated Section 2 by obstructing the interconnection of other communications common carriers with AT&T, by obstructing the interconnection of customer-provided terminal equipment with the Bell system, by refusing to sell terminal equipment to Bell subscribers and by restricting AT&T purchases of telecommunications equipment requirements to Western Electric (Pet. App. 55a). The complaint prayed that Western Electric be divested from AT&T; that Western Electric be divested of sufficient manufacturing assets to insure competition in the manufacture and sale of telecommunications equipment; and that AT&T's Long Lines Department be separated from the Bell Operating Companies to the extent necessary to insure competition in telecommunications service and equipment (Pet. App. 57a).

Defendants answered the complaint but on February 20, 1975, the district court stayed discovery and further proceedings (Pet. App. 3a) to consider petitioners' claims that "they enjoy[ed] implied immunity from antitrust liability because they are subject to a pervasive scheme of regulation imposed by the Federal Communications Act [47 U.S.C. 151 *et seq.*] and state regulatory statutes * * * [and that] because the Court has no * * * jurisdiction herein, the question of primary jurisdiction cannot arise, and would not be an appropriate exercise of discretion in this case" (Pet. App. 4a).

At the invitation of the district court, the Federal Communications Commission filed a brief *amicus*

curiae. The Commission agreed with the United States that AT&T had no blanket immunity from antitrust liability under the Federal Communications Act, but that certain areas were within its exclusive or primary jurisdiction (Pet. App. 5a).[4]

C. Because there has been little discovery in this case, the nature of the issues for purposes of AT&T's claim of immunity has been developed largely in terms of what the government intends to prove under the allegations of its complaint. The government's contentions have been stated as arguments in various memoranda (Pet. App. 12a); they have not been embodied into pretrial orders, amendments, supplemental pleadings, responses to requests for more definite statements and disclosures on the record of the kind customarily associated with discovery because

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[4] The district court summarized the Commission's position as follows (Pet. App. 5a):

"* * * [T]he following three areas are impliedly delegated to the Commission's exclusive jurisdiction which antitrust courts should not disturb by *ad hoc* rulings: (1) in view of Section 214 of the Act, only the Commission may require, through its certification process, entry into or exit from a communications common carrier market; (2) in view of Section 201 of the Act, antitrust courts should not countermand Commission orders requiring carriers to interconnect their telephone systems; and (3) in view of Section 205 of the Act, courts should not base antitrust relief or remedies upon tariff provisions or conduct pursuant to tariff provisions which the Commission has either 'approved or prescribed' after the required investigation.

"The Commission urges the Court to refer unsettled issues which may substantially affect the Commission's regulatory policies to the Commission under the doctrine of primary jurisdiction and to take judicial notice where the Commission has settled such questions, so as to reconcile the regulatory scheme and the scheme of the antitrust laws."

the proceedings have been stayed (see *infra*, p. 12). To aid the Court, there follows a summary of the government's theory of its case under the complaint.

AT&T and its subsidiaries have enjoyed for decades [5] three major monopolies: AT&T's Long Lines Department has a monopoly in inter-city telecommunications services; AT&T's 23 operating companies have monopolies of local exchange telecommunications services in each of their respective franchise areas; and Western Electric has a monopoly in equipment manufacturing, including all three equipment submarkets, transmitting, switching, and terminal equipment. These monopolies give AT&T the ability, incentive, and leverage to defend against new competition and to strengthen and maintain its monopoly power in each market.

(*1*) *The inter-city service monopoly.* AT&T has used its power in the inter-city and local service markets to deter the entry of potential competitors and to force out those who succeeded in entering. Its actions were often in violation of the Communications Act and Federal Communications Commission policy, as well as the antitrust laws. It has engaged in predatory pricing [6] and has refused to interconnect with

[5] See generally Federal Communications Commission, *Telephone Investigation, Proposed Report* (1939) ("Walker Report"), and Danielian, *AT&T: The Story of Industrial Conquest* (1939).

[6] *American Telephone and Telegraph, Telpak*, 37 F.C.C. 1111, modified 38 F.C.C. 761, affirmed *sub nom. American Trucking Ass'ns, Inc.* v. *Federal Communications Commission*, 377 F. 2d 121 (C.A. D.C.), certiorari denied, 386 U.S. 943; *American Telephone and Telegraph, Revisions of Tariff FCC No. 260, Private Line Services Series 5000 (Telpak)*, 61 F.C.C. 2d 587. After Long Lines introduced lower rates for the transmission of digital signals, its principal digital transmission competitor, Datran, was forced into bankruptcy shortly after the conclusion of lengthy proceedings to examine these rates. The rates were ultimately found to be anticompetitive in effect, unreasonably low and subsidized by other services, and so in violation of the Communications Act and Commission policy. *American Telephone and Telegraph, Investigation into the Lawfulness of Tariff FCC No. 267, Offering a Dataphone Digital Service Between Five Cities ("DDS")*, 62 F.C.C. 2d 774.

competing carriers [7] or has delayed interconnection or offered it on a restrictive basis without justification in order to place competitors at a commercial disadvantage. AT&T local operating companies—whose services are needed by all long-distance carriers to reach individual customers—have also refused to deal with competitors or potential competitors of Long Lines, or have done so only on highly discriminatory terms and conditions.[8]

(*2*) ***The equipment manufacturing monopoly.*** The monopoly in equipment manufacturing stems from

[7] "Carrier interconnection" refers to physical or other connections between two communications carriers for the transmission of signals. AT&T interconnections with competing carriers are particularly significant where AT&T enjoys a monopoly service (usually local exchange service) which an inter-city carrier must utilize to reach its individual customers, and where AT&T has an existing inter-city line which another carrier wants to utilize to complete a longer line.

[8] *Bell System Tariff Offerings*, 46 F.C.C. 2d 413, affirmed *sub nom. Bell Telephone Co. of Pa.* v. *Federal Communications Commission*, 503 F. 2d 1250 (C.A. 3), certiorari denied, 422 U.S. 1026; *American Telephone and Telegraph, Offer of Facilities for Use by Other Common Carriers*, 52 F.C.C. 2d 727, affirmed *sub nom. Carpenter* v. *Federal Communications Commission*, 539 F. 2d 242 (C.A. D.C.); *Joint Petition of CPI Microwave, Inc., and Midwestern Relay Co.*, 54 F.C.C. 2d 502.

AT&T's monopolies in the other two markets. AT&T maintains the equipment monopoly by its policy of purchasing transmission, switching and terminal equipment almost exclusively from Western Electric, even where outside suppliers have better equipment available for earlier delivery at lower prices.[9]

Where AT&T's position as the principal buyer of equipment is not sufficient to protect Western Electrict's monopoly—*i.e.,* in the purchase of terminal equipment [10] by individual customers—AT&T has used other means to protect Western Electric's monopoly. For many years it prohibited its service customers from interconnecting their own (the customers') terminal equipment to telephone company lines. After restrictions on non-harmful interconnection were declared illegal,[11] AT&T required that customer-provided equipment be connected only through a needlessly complex and expensive interface device supplied by the operating companies, which the Commission found to be discriminatory and unreasonable.[12]

[9] *American Telephone and Telegraph, Charges for Interstate Telephone Service, Docket 19129, (Phase II)*, 64 F.C.C. 2d 1, 28 n. 47, 41.

[10] Terminal equipment includes all of the receiving instruments which a customer might use, from the familiar home telephone to complex switchboard and switchboard-type business telephone systems.

[11] *Hush-a-Phone Corp.* v. *United States*, 238 F. 2d 266, 269 (C.A. D.C.), reversing 20 F.C.C. 391, on remand, 22 F.C.C. 112; *Carterfone*, 13 F.C.C. 2d 420, reconsideration denied, 14 F.C.C. 2d 571.

[12] *Interstate and Foreign MTS and WATS*, 56 F.C.C. 2d 593, 58 F.C.C. 2d 736, affirmed *sub nom. North Carolina Utilities Commission* v. *Federal Communications Commission*, 552 F. 2d 1036 (C.A. 4), certiorari denied, No. 76–1675 (October 3, 1977). AT&T has also used other tactics to deter equipment competitors: selling telephone service and terminal equipment as a single unit ("bundling"); refusing to sell inside wiring to customers wishing to provide their own equipment; renting rather than selling terminal equipment to prevent the development of a secondary market in terminal equipment; and predatory pricing.

(3) *The local monopolies.* The 23 local operating companies' monopolies are used to support both Long Lines' and Western Electric's monopolies. Sometimes, though, they in turn receive support from the long-distance and equipment monopolies. For example, AT&T has denied Long Lines' services—toll interconnections—to new communities seeking to establish their own local exchange systems.[13]

In addition, the local operating companies have themselves sought to prevent the development of two new industries which would dilute their monopoly power: land mobile radio and community antenna television. In 1949 the Commission awarded frequencies to AT&T local operating companies and independent radio common carriers in the hope of developing "competing systems, techniques, and equipment" in the mobile telephone, paging and dispatch service markets served by land mobile carriers.[14] The local operating companies for years impaired the radio common carriers' development by refusing to

[13] This occurred recently at a planned community near Houston, Texas. *Mid-Texas Communications Systems, Inc.* v. *American Telephone and Telegraph*, S.D. Tex., Civil No. 73–H–1577, filed November 19, 1973.

[14] *General Mobile Radio Service*, 13 F.C.C. 1190, 1218.

interconnect them to the local and national telephone systems, or by interconnecting only on severely disadvantageous terms.[15]

AT&T operating companies have also sought to impede the development of an independent community antenna television ("CATV" or "cable") industry because of the potential competition it poses to the local operating companies' monopoly in the distribution of nonbroadcast communications services, such as data transmission. The operating companies denied cable operators pole space and then devised a channel lease service for cable operators to induce them not to develop their own plant. By means of delay and discriminatory treatment, AT&T has repeatedly used its monopoly power in local service to stymie the development of these competitors.[16]

D. On November 24, 1976, the district court ruled that it has jurisdiction in the case (Pet. App. 2a–12a). It rejected as contrary to the language and history of the Communications Act petitioners' claim that they have an implied, blanket immunity for all violations of the antitrust laws which they might commit

[15] *Amendment of Part 21 of the Commission's Rules With Respect to the 150.8–162 Mc/s Band*, 12 F.C.C. 2d 841, 852, affirmed *sub nom. Radio Relay Corp.* v. *Federal Communications Commission*, 409 F. 2d 322 (C.A. 2).

[16] For an example of the impact of petitioners' tactics, see *Better TV., Inc.* v. *New York Telephone Co.*, 31 F.C.C. 2d 939. While AT&T is now negotiating with the CATV industry as a result of Commission intercession, many issues remain unresolved and the potential for cable development as a local distributor of innovative non-broadcast communications services has been delayed.

in the fields of communications services and equipment (Pet. App. 9a). The court held that immunity cannot be inferred from pervasiveness of regulation, but exists only where specific conflicts between antitrust and regulatory jurisdiction are found in discrete instances (Pet. App. 8a–9a). In the absence of any showing by petitioners at this stage in the proceedings of specific conflicts between regulatory and antitrust requirements, the court declined to dismiss any particular element of the complaint (Pet. App. 8a–9a). The court stated that some aspects of the complaint might well be subject to the Commission's primary jurisdiction, but ruled that until discovery had sufficiently sharpened the issues, reference was not appropriate (Pet. App. 11a).

E. On January 6, 1977, the defendants filed in this Court a motion for leave to file a petition for a common law writ of certiorari or a statutory writ of certiorari before judgment in the court of appeals (Pet. 12). Simultaneously they filed a petition for a common law writ of certiorari in the court of appeals. This Court on January 25, 1977, summarily denied the petition. 429 U.S. 1071.

The court of appeals on February 3, 1977, directed the United States to respond to the petition, and invited the Commission to submit its view *amicus curiae*. On May 26, 1977, the court of appeals (Bazelon and Wilkey, JJ.) denied the petition for certiorari in an order without opinion (Pet. 13; Pet. App. 1a). The court, on July 7, 1977, denied AT&T's petition for

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rehearing and rehearing *en banc,* no judge in active service having requested a poll of the circuit (Pet. 2).

The district court had lifted its stay of discovery on December 15, 1976, but the court of appeals issued a stay that remained in effect until its decision of May 26, 1977, and on August 11, 1977, issued a further stay pending disposition of the petition in this Court. In the district court, therefore, this case has not progressed beyond the complaint, answer, and rejection of AT&T's broad jurisdictional defense.

ARGUMENT

1. For the second time in less than a year petitioners seek extraordinary interlocutory review of their contention that state and federal regulation of communications carriers reflects an unstated congressional purpose totally to exempt all of their activities from the antitrust laws. The record is unchanged from what it was when this Court denied petitioners' applications on January 25, 1977, except that the court of appeals has denied petitioners' application for an extraordinary writ. That court's order, we submit, confirms the considerations outlined in our earlier opposition (No. 76–939), that piecemeal review of interlocutory decisions by extraordinary writ in this case is inappropriate. Those considerations—to which we adhere, but do not reiterate—are dispositive. Given the still preliminary stage of this case, and the well-established policy against interlocutory review in government civil antitrust cases (Memorandum for the United States, No. 76–939, p. 7),

as well as the demonstrable lack of merit in petitioners' sweeping claim of antitrust immunity (see pp. 14–28, *infra*), the court of appeals did not abuse its discretion in denying petitioners' application for a common law writ of certiorari under 28 U.S.C. 1651(a). *Kerr* v. *United States District Court,* 426 U.S. 394, 402–403.

Petitioners' claim that the costs of the litigation and the burdens of discovery warrant extraordinary review is unsound as a matter of law,[17] and is both speculative and exaggerated: once the district court is allowed to proceed with this long delayed antitrust case, the issues will be refined and the scope of discovery limited by that court as in any other large litigation.[18]

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[17] Memorandum for the United States, No. 76–939, pp. 4–7.

[18] Petitioners' description of the costs and burdens of the litigation are apparently based upon their claim that they must "prepare to defend each and every activity in which the Bell System has engaged since its inception which might arguably be said to be anticompetitive * * * review all of the documents in their own files relevant to any such activity * * * subpoena every non-party that may have been involved * * * and * * * even conduct discovery against the regulatory agencies that supervised and controlled these activities" (Pet. 16–17). Such boundless discovery is not justified by the complaint, which focuses upon specific areas of alleged misconduct (see pp. 6–11, *supra*, 22–28 *infra*). Petitioners disregard the district court's responsibility—which it expressly recognizes (Pet. App. 10a)—to define the issues and to dispose of specific questions of exclusive or primary administrative jurisdiction as they arise. There is no basis, therefore, for petitioners' contention that this single case will impair the functioning of the federal judicial system, or "chill" the regulatory process. The Federal Communications Commission, as *amicus curiae*, by supporting the

To the extent that petitioners contend that if their theory of implied blanket immunity is unacceptable, the court should make the case "more manageable" by deciding the elements the government may pursue under the complaint (Pet. 22–23), they invite this Court to undertake the district court's function of shaping the case for trial and to do so on the present undeveloped record. This approach is impractical because in its appellate capacity this Court does not have the pre-trial powers or responsibilities of the district courts; it is improper, because this Court should not undertake such functions; and it is inconsistent with petitioners' position in the courts below, where they sought outright dismissal of the complaint for lack of jurisdiction (Pet. App. 2a). Denial of the instant applications will not deprive petitioners of the alternative relief they seek; on the contrary, the district court will be able to resume its long-postponed task of defining the dimensions of the dispute.

2. The district court correctly held that petitioners' blanket claim of immunity is without merit (Pet. App. 8a), and that to the extent that particular activities covered by the complaint are within the exclusive or primary jurisdiction of the Federal Communications Commission, those questions must be resolved as the record develops (Pet. App. 10a).

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complaint subject to recognition of its responsibilities in carefully defined areas, has clearly indicated that the pendency of this suit will not interfere with the proper performance of its duties. Despite its enormous size, AT&T is as amenable to the judicial and administrative process as any other commercial organization.

A. Telephone companies, like other common carriers,[19] become subject to the antitrust laws when their activities extend into or affect interstate commerce.[20] This did not change when Congress subjected interstate telephone companies to regulation by the Interstate Commerce Commission in the Mann-Elkins Act of 1910, 36 Stat. 539.[20a] When, in the Communications Act of 1934, 48 Stat. 1064, 47 U.S.C. 151 *et*

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[19] *E.g.*, *United States* v. *Trans-Missouri Freight Ass'n*, 166 U.S. 290; *Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439; see *Keogh* v. *Chicago & Northwestern R. Co.*, 260 U.S. 156, 161–162; accord, *Mt. Hood Stages, Inc.* v. *Greyhound Corp.*, 555 F. 2d 687 (C.A. 9); *United States* v. *Morgan Drive-Away, Inc.*, 1974–1 CCH Trade Cases ¶74,888 (D. D.C.); *Monticello Heights, Inc.* v. *Morgan Drive-Away, Inc.*, 1974–2 CCH Trade Cases ¶75,282 (S.D.N.Y.); *In re Grand Jury Subpoena Duces Tecum*, 405 F. Supp. 1192 (N.D. Ga.).

[20] *United States* v. *American Telephone and Telegraph Co.*, 1 Decrees and Judgments in Civil Federal Antitrust Case 572 (D. Ore.); *United States Telephone Co.* v. *Central Union Telephone Co.*, 202 Fed. 66 (C.A. 6), certiorari denied, 229 U.S. 620. Indeed, it was to forestall further government antitrust suits that AT&T in 1913 made the so-called "Kingsbury Commitment" to Attorney General McReynolds, in which it agreed to divest Western Union, to cease its acquisition of competing independent telephone operating companies, and to interconnect with noncompeting independent telephone companies. Danielian, *supra*, at 76–77; Walker Report, *supra*, at 155–156.

[20a] In 1920 Congress passed the Transportation Act, 41 Stat. 456. This statute increased the Interstate Commerce Commission's power over railroads but left regulation of communications carriers substantially the same as it had been. The Committee Report states: "[T]he committee left the control of wire systems practically as it was under the interstate commerce act prior to [wartime] Federal control." H.R. Rep. No. 456, 66th Cong., 1st Sess. 11 (1919); see also, H.R. Conf. Rep. No. 650, 66th Cong., 2d. Sess. 61 (1920).

seq., Congress consolidated regulatory authority over communications in the Federal Communications Commission, it clearly indicated an intent to limit antitrust exemption to narrow and clearly defined situations and otherwise provided for application of the antitrust laws to communications common carriers. First, the Act contains two specific grants of immunity which, of course, would be "mere redundancy" (*Jarecki* v. *G. D. Searle & Co.*, 367 U.S. 303, 307–308) if Congress had intended to confer a blanket immunity on communication carriers. Section 221(a) (47 U.S.C. 221 (a)), a continuation of the Willis-Graham Act of 1921, 42 Stat. 27, immunizes the merger or consolidation of telephone companies when approved by the Commission.[21] Section 222 (c)(1) was enacted in 1943 to permit the Commission to authorize the Western Union Telegraph Company to acquire its sole domestic competitor, the Postal Telegraph Company. Congress provided express antitrust immunity because it had concluded that "the antitrust laws now stand in the way of such consolidation and mergers." H.R. Rep. No. 69, 78th Cong., 1st Sess. 2 (1943). Second, Section 602(d) add[illegible]he Federal Communications Commission to the l[illegible]st of agencies authorized by Section 11 of the Clayton Act (15 U.S.C. 21) to enforce the prohibitions of that Act against price discrimination, rebates, mergers and interlocking directorates that injure competition or tend to monopoly (15 U.S.C. 13, 13a, 18 and 19). See *Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439,

[21] The legislative history of the Willis-Graham Act shows that Congress intended to permit the regulatory agency to allow consolidation of competing local telephone companies that would otherwise violate the antitrust laws, but that the exemption was to apply only in this narrow area. See S. Rep. No. 75, 67th Cong., 1st Sess. (1921); 61 Cong. Rec. 1983–1985 (1921) (remarks of Representative Graham).

456. Section 11 expressly provides, however, that "[n]o order of the commission * * * shall in anywise relieve or absolve any person from any liability under the antitrust laws." 15 U.S.C. 21(e). Finally, the Act expressly provides in Section 414 that nothing contained in it "shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." 47 U.S.C. 414. Other statutory remedies therefore continue to be applicable unless their coexistence with the provisions of the act are "absolutely inconsistent." *Nader* v. *Allegheny Airlines*, 426 U.S. 290, 298–303.

These carefully tailored provisions show that Congress knew how to confer antitrust immunity on communications carriers when it wished to do so. Its limitation of such immunities in the Communications Act demonstrates that it did not intend to grant the sweeping exemption petitioners claim. Cf. *United States* v. *Borden Co.*, 308 U.S. 188, 201; *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers*, 414 U.S. 453, 458. The District Court, therefore, correctly concluded "that the Communications Act does not expressly, or impliedly, repeal the antitrust laws * * * [and that] [n]either the language, nor the legislative history of the Communications Act supports the conclusion that Con-

gress intended by that Act to grant a total, blanket immunity to defendants from application of antitrust laws, and to place exclusive jurisdiction over all their conduct in the Federal Communications Commission" (Pet. App. 9a).

B. Petitioners' broad assertion that "where the challenged conduct is subject to a pervasive scheme of common carrier regulation, such conduct is necessarily immune from the antitrust laws" (Pet. 25) is contrary to the decisions of this Court. It is well settled that common carriers may be liable under the antitrust laws despite "pervasive" common carrier regulation similar to Title II of the Communication Act.

In *Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439, this Court ruled that the Interstate Commerce Act did not immunize railroads from antitrust liability under Section 1 of the Sherman Act for collective price-fixing, even though the prices fixed were rates subject to Commission regulation. It stated that regulated firms "are not *per se* exempt from the Sherman Act," and that railroad common carriers "are subject to the anti-trust laws." *Id.* at 456. That decision reaffirmed *Keogh* v. *Chicago & Northwestern R. Co.*, 260 U.S. 156, in which the Court held that awarding antitrust damages for a rate-fixing conspiracy was inconsistent with the stringent tariff provisions of the Interstate Commerce Act, but noted that those provisions did not bar the United States from enforcing the Sherman Act's injunctive and criminal provisions against carriers. *Id.* at 161–162.[22] Accord, *Terminal*

[22] Petitioners assert that *Georgia* involved a price-fixing combination, a "specific matter" which "was not subject to [pervasive common carrier] regulation * * *" (Pet. 27). The alleged anti-trust violation in *Georgia* was a conspiracy to fix rates filed with the Interstate Commerce Commission, and the regulatory agency, though possessed of "pervasive" powers, was without authority to regulate or punish it. Similarly, in the present case the actionable wrong is a wide-ranging monopolization of three telecommunications markets, and the Commission is likewise without authority to regulate or to punish it. Just as this Court in *Georgia* recognized that allowance of the antitrust action would promote rather than conflict with the agency's regulation (324 U.S. at 459–461), so allowance of this antitrust action would have the same beneficial results.

Petitioners also err in contending that *Georgia* is distinguishable because Congress had previously declined to confer on the Interstate Commerce Commission authority to regulate rate-fixing combinations (Pet. 27). The Court mentioned the matter only in passing and it is not central to the holding (324 U.S. at 457). In any event, Congress has also declined to grant the Federal Communications Commission authority to regulate petitioners' structure or intracorporate relations. *See* H.R. Rep. No. 1850, 73d Cong., 2d Sess. 3 (1934); S. Rep. No. 781, 73d Cong., 2d Sess. 2 (1934).

Warehouse Co. v. *Pennsylvania Railroad Co.*, 297 U.S. 500, 511, 515–516.

As the Court recently observed in *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 597, n. 36, it "'has never held * * ** that the antitrust laws are inapplicable to anticompetitive conduct simply because a federal agency has jurisdiction over the activities of one or more of the defendants,'" quoting *Gordon* v. *New York Stock Exchange*, 422 U.S. 659, 692–693 (Stewart, J., concurring). Indeed, "[t]he Court has consistently refused to find that regulation gave rise to an implied exemption without first determining that exemption was necessary in order to make the regulatory Act work, 'and even then only to the minimum extent necessary.'" *Id.* at 597, citing *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 391 (Stewart, J., dissenting). See *Silver* v. *New York Stock Exchange*,

373 U.S. 341, 357. *United States* v. *Philadelphia Nat. Bank,* 374 U.S. 321, 350–351; *California* v. *Federal Power Commission,* 369 U.S. 482.[23] The Court has also held that when "relationships are governed in the first instance by business judgment and not regulatory coercion," the antitrust laws apply, *Otter Tail Power*

[23] This is plainly reflected in the cases upon which petitioners rely (Pet. 25–26). In *Gordon* v. *New York Stock Exchange, supra,* the Court found implied immunity because a section of the Securities and Exchange Act contemplated that securities exchanges could, to the extent permitted by the Securities and Exchange Commission (SEC), fix their members' commission rates. In *United States* v. *National Association of Securities Dealers,* 422 U.S. 694, a specific provision of the Investment Company Act authorized, subject to SEC disapproval, vertical restrictions on the distribution of mutual shares. In *Keogh* v. *Chicago & Northwestern R. Co., supra,* 260 U.S. at 165, the Court held that an action by a shipper against a carrier under the antitrust laws for damages suffered from an alleged rate fixing conspiracy was incompatible with the stringent tariff provisions of the Interstate Commerce Act; the Court, nevertheless, held that the Act, as amended by the Transportation Act of 1920, 41 Stat. 456, did not bar the United States from enforcing the Sherman Act's injunctive and criminal provisions against carriers. 260 U.S. at 161–162. *Terminal Warehouse Co.* v. *Pennsylvania Railroad Co.,* 297 U.S. 500, following *Keogh,* held only that a private party claiming to have suffered business injury because a competitor had agreed with a rail carrier to receive illegal preferences had a damage remedy against the competitor only under the Interstate Commerce Act. The court expressly noted, however, that carrier participation in a conspiracy to restrain trade or monopolize would be subject to the antitrust laws. *Id.* at 511, 515–516. In *Pan American World Airways* v. *United States,* 371 U.S. 296, the court held that a monopolization complaint dealing with air route allocations charged the "*precise* ingredients of the [Civil Aeronautics] Board's authority" over air carriers certificates affiliations and routes (*id.* at 305; emphasis added) and therefore "the narrow questions presented by the complaint" (*id.* at 313) should be remedied by the Board under its powers to correct unfair methods of competition. Since the Board, unlike the Federal Communications Commission, had authority to provide the very remedy sought by the United States' antitrust suit dismissal was proper as a matter of judicial efficiency. *Id.* at 313, n. 19. The Court, moreover, expressly stated that the antitrust laws were not totally displaced even by that regulatory scheme. *Id.* at 304–305. In *Hughes Tool Co.* v. *Trans World Airlines,* 409 U.S. 363, the court held only that certain transactions were immune from the antitrust laws because the Civil Aeronautics Board had approved them under provisions of the Federal Aviation Act that triggered an express statutory immunity from the antitrust laws.

Co., supra, 410 U.S. at 374; *United States* v. *Radio Corporation of America,* 358 U.S. 334, 350–351.

Under these criteria, implication of an exemption from the antitrust laws arises only where, in particular cases, there is plain repugnancy between the antitrust laws and particular regulatory provisions. Immunity, therefore, does not turn on the presence or absence of pervasive regulation, but on whether specific types of conduct are required by the regulatory scheme or are indispensable to its functioning.

Insofar as petitioners rest their claim of blanket immunity on "pervasive regulation" by the States, the Court expressly rejected their contention in *Cantor, supra,* under the criteria summarized above.[24]

Petitioners' reliance (Pet. 37) on *Seatrain Lines, Inc.* v. *Pennsylvania R. Co.,* 207 F. 2d 255 (C.A. 3),

[24] In *Cantor, supra,* the Michigan Bell Telephone Co. and other Michigan public utilities unsuccessfully contended "that the competitive standard imposed by antitrust legislation is fundamentally inconsistent with the 'public interest' standard widely enforced by regulatory agencies, and that the essential teaching of *Parker* v. *Brown* [317 U.S. 341] is that the federal antitrust laws should not be applied in areas of the economy pervasively regulated by state agencies." 428 U.S. at 575.

is also misplaced. In *Seatrain* the court held that some portions of an antitrust complaint against railroads were within the primary jurisdiction of the Interstate Commerce Commssion and directed the dismissal of the complaint with leave to replead the various allegations that were outside the Commission's primary jurisdiction. In the present case the district court specifically recognized that some portions of the government's complaint might be found to be within the Commission's primary jurisdiction as the case developed (Pet. App. 11a), but petitioners have maintained that the doctrine of primary jurisdiction is not appropriate here (Pet. App. 4a).

C. By holding that "it has antitrust jurisdiction of at least some of the aspects of the case" (Pet. App. 9a), the district court recognized that at this stage it cannot determine what particular matters covered by the complaint might be exempt from the antitrust laws. Whatever questions concerning the primary jurisdiction of the Federal Communications Commission may appear as the case develops (Pet. App. 9a–11a), we submit that there is no "irreconcilable conflict" between the specific subject matter of this law suit and specific provisions of the Communications Act. Thus there is no basis for inferring an antitrust exemption for any of the particular activities challenged (see discussion pp. 6–11, 21, *supra*). This may be seen from a comparison of the specific charges in the complaint with the Commission's responsibilities under the Communications Act. Far from being conflicting, they are complementary.

(*1*) *Refusal to sell terminal equipment* (Pet. 29–32). One of the several means alleged by which AT&T monopolized the submarket for terminal equipment was the refusal of its operating companies to sell terminal equipment (Complaint, ¶29(f), Pet. App. 55a), thus forestalling development of a secondary market for used equipment and an independent repair industry.

Nothing in the Communications Act prohibits telephone companies from selling terminal equipment or authorizes refusals to sell for the purpose of preserving a monopoly. Although AT&T is required to furnish upon request the services and facilities necessary to perform its common carrier functions, the Act neither requires nor authorizes AT&T to exclude others from providing some part or all of the services or facilities involved, provided they obtain any necessary authorization. On the contrary, as AT&T recognizes (Pet. 30–31), the Act is neutral on the issue of terminal equipment sale. That AT&T's decision to sell or not sell terminal equipment might be embodied in a tariff filed with Federal or state agencies (Pet. 31–32) does not make its decision any less its own, or place it beyond the antitrust laws. *Cantor* v. *Detroit Edison Co., supra.*[25]

(*2*) *Refusal to allow interconnection of customer-provided equipment.* As part of its design to control the market for terminal equipment, AT&T allegedly

[25] It is our understanding that AT&T's policy of refusing to sell terminal equipment to customers has never been made part of any tariff filed with the Federal Communications Commission. AT&T's

has either prohibited or unreasonably restricted customers from interconnecting their own terminal equipment to AT&T's lines (Complaint, ¶29(e), Pet. App. 55a). Although AT&T speaks of a duty to provide "end-to-end service" (Pet. 32), the duty is self-appointed. The Communications Act contains nothing which requires or condones complete control by AT&T over terminal equipment. Conversely, a basic policy of the Act is to guarantee to telephone subscribers the right to make use of the telephone network in ways that are "privately beneficial without being publicly detrimental." *Hush-A-Phone Corp.* v. *United States,* 238 F. 2d 266, 269 (C.A. D.C.). Thus, the whole thrust of the Act is toward subscribers' freedom of choice in equipment. The Commission for three decades has been attempting to stop AT&T from interfering with customer rights guaranteed by the Act.[26] As the Commission said in the district court, the antitrust laws are fully compatible with that effort. FCC Amicus Br., pp. 16–18.

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suggestion that its practice is impliedly immune under the Communications Act because early in this century some states prohibited customers from owning terminal equipment (Pet. 30) is irrelevant. No such prohibition can be found in the Communications Act or its legislative history. Nor has a showing been made that AT&T's actions were required as a matter of state policy and thus exempt from the antitrust laws as "state action" under *Cantor* and *Parker* v. *Brown, supra.*

[26] *Use of Recording Devices in Connection with Telephone Services,* 11 F.C.C. 1033; *Jordaphone Corp. of America* v. *American Telephone and Telegraph,* 18 F.C.C. 644; *Hush-A-Phone* v. *American Telephone and Telegraph,* 22 F.C.C. 112; *Carterfone,* 13 F.C.C. 2d 420, reconsideration denied, 14 F.C.C. 2d 571; *Interstate*

(*3*) ***Carrier Interconnection.*** One alleged means AT&T used to protect its monopolies in inter-city communications services was to deny necessary interconnections to its inter-city competitors (Complaint, ¶29(a)–(d), Pet. App. 55a). Since competitors need the local distribution services of AT&T's local operating companies, denial of those local interconnections had a serious anticompetitive effect.[27]

The Communications Act generally leaves to the carriers' own business judgment the decision of whether or not to interconnect. It does not bar carriers from interconnecting, nor does it authorize them to deny interconnection for anticompetitive purposes. Section 201(a), 47 U.S.C. 201(a) empowers the Commission to order one carrier to interconnect with another where the public interest would be served thereby. Since interconnection is a matter primarily within the carriers' own business judgment, they are subject to the normal strictures of the antitrust laws, subject only to the Commission's authority to require interconnection where it is necessitated by the public interest. *Cf. Otter Tail Power Co.* v. *United States, supra.* Application of the antitrust laws imposes no incon-

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and Foreign MTS and WATS, 56 F.C.C. 2d 593, modified, 58 F.C.C. 2d 736, affirmed *sub nom North Carolina Utilities Commission* v. *Federal Communications Commission,* 552 F. 2d 1036 (C.A. 4), certiorari denied, No. 76–1675, October 3, 1977.

[27] AT&T also denied interconnections on an inter-city basis to competing carriers which needed such interconnection to carry signals where their own facilities do not go.

sistent standards on AT&T. The antitrust laws do not require interconnection where the Commission has prohibited it, or prohibit the interconnection where the Commission has required it.[28] The Commission, in fact, indicated below that application of the antitrust laws to such carrier practices would neither contradict the provisions of the Act nor impair the implementation of its policies. FCC Amicus Br., pp. 14–16.

(*4*) *AT&T equipment purchase policies.* Another alleged means AT&T has used to monopolize the market for equipment is its policy of purchasing its equipment needs largely from Western Electric (Complaint, ¶29(g) and (h), Pet. App. 55a), even where competitors offered better equipment sooner at lower cost.[29] The Commission has no direct authority over the non-operating activities of AT&T, and so no authority over its two non-operating companies, Western Electric and Bell Labs. Its sole contact with these two companies results from its regulation of the reasonableness of interstate service rates.[30] In determining a proper rate base, it may determine the reasonableness of AT&T's expenses in securing equipment and service from these two companies. And in computing AT&T's rate of return, it may take into account the rate of return being earned by Western Electric and Bell Labs. *Nader* v. *Federal Communications Commission,* 520 F. 2d 182, 195–198 (C.A. D.C.).

[28] Although the Commission has no express authority to prohibit interconnection, it urged before the district court that orders to interconnect which might affect regulatory policy should be referred to it under the primary jurisdiction doctrine. FCC Amicus Br., p. 15. We agree.

[29] Concomitantly, with minor exceptions it requires Western Electric to sell only to AT&T companies.

[30] *American Telephone and Telegraph, Charges for Interstate Telephone Service,* 64 F.C.C. 2d 1, 13 n. 21, 20 n. 31, 22.

Petitioners also contend that AT&T's vertical integration with Western Electric "contributes to [its] ability to fulfill its statutory duties" (Pet. 35). In fact, the Commission has found to the contrary, and has sought to free the operating companies from the coercive effect of Western Electric's involvement in their equipment-purchase decisions.[31] A significantly anticompetitive arrangement or practice which, in any event, does no more than "contribute" to AT&T's ability to satisfy its statutory obligation, can hardly be held immune from antitrust inquiry when the statutory duty could be met by an arrangement which is not anticompetitive. For that reason, the Commission

[31] *American Telephone and Telegraph, Charges for Interstate Telephone Service, supra,* n. 30. The Commission found that competition in communications equipment had produced and likely would continue to produce many benefits to consumers (64 F.C.C. 2d at 26), and that such competition was stifled by Western Electric's role in the operating companies' equipment purchase decisions (*id.* at 41). The Commission did not believe consumers were getting "the best quality and least costly equipment under present Bell system policies and practices" (*id.* at 42), which at least induced and sometimes compelled the operating companies to purchase their equipment from Western Electric notwithstanding better offers from competitors. The Commission ordered AT&T to change its equipment purchase decision-making system to give Western Electric less influence (*id.* at 43–45).

has indicated that the application of the antitrust laws to the relationship between Western Electric and AT&T would not necessarily interfere with the regulatory scheme. FCC Amicus Br., pp. 21–25.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the court of appeals or to the district court should be denied.

Respectfully submitted.

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NOVEMBER 1977.

Appendix

Section 602(d) of the Communications Act of 1934, 48 Stat. 1102, provides:

> The first paragraph of section 11 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 [Clayton Act], is amended to read as follows:
>
> SEC. 11. That authority to enforce compliance with sections 2, 3, 7, and 8 of this Act by the persons respectively subject thereto is hereby vested: In the Interstate Commerce Commission where applicable to common carriers subject to the Interstate Commerce Act, as amended; in the Federal Communications Commission where applicable to common carriers engaged in wire or radio communications or radio transmission of energy; in the Federal Reserve Board where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce, to be exercised as follows:"

Section 11(e) of the Clayton Act, 38 Stat. 736, as amended, 15 U.S.C. 21(e), provides in pertinent part:

> * * * No order of the commission or board or the judgment of the court to enforce the same shall in any wise relieve or absolve any person from any liability under the antitrust Acts.

U.S. GOVERNMENT PRINTING OFFICE: 1977

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-372

AMERICAN TELEPHONE AND TELEGRAPH COMPANY; WESTERN ELECTRIC COMPANY, INC.; and BELL TELEPHONE LABORATORIES, INC., *Petitioners*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITIONERS' REPLY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION

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November 3, 1977

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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STATEMENT

The Government's brief in opposition to the petition effectively asks the Court to close its eyes to the stark realities of this case. As pointed out in the petition (p. 15), this case as presently postured would almost certainly be the most lengthy, expensive and burdensome proceeding in the history of American law—one that the Attorney General himself has characterized as possibly so inherently complex as to be "beyond the capacity of the courts" (p. 22), and one which already has been further complicated by the legal uncertainty surrounding the very issues now sought to be presented to this Court (p. 23). The Government does

not directly deny any of these realities; instead, it largely ignores them, apparently in the hope that the Court will treat the case as though they do not exist. The result of this strategy is a Pollyanna-like presentation which treats the issues set forth in the petition as mere procedural problems, which treats petitioners' request for immediate review of those issues as an effort to avoid merely routine discovery burdens, and which treats the need for resolution of such issues as a matter of relative insignificance that can and should be dealt with by the district court during the course of such discovery. Consequently, before responding in detail to the Government's arguments, it seems critical to restore the issues presented by the petition to their proper perspective.

This is not an ordinary, run-of-the-mill lawsuit; quite the contrary, it is enormous even when compared to other major Government civil antitrust suits under Section 2 of the Sherman Act. The Government's complaint attacks virtually every tariff filed by the Bell System over the past 75-100 years and would require the re-litigation of hundreds of regulatory proceedings, many of them lengthy proceedings in themselves; it would require an investigation, not only of the evidence and arguments presented in those regulatory proceedings, but of the internal discussions that preceded and surrounded them as well; and it would open to challenge virtually every transaction between the constituent parts of the Bell System since its inception almost a century ago. The petition for certiorari does not merely seek interlocutory guidance with respect to the conduct of such a case but presents fundamental issues of whether the district court may properly assert antitrust jurisdiction over all, or any

part, of the Government's complaint. Hence, a resolution of the issues presented by the petition would go, not to some merely interlocutory matter of relative insignificance, but to the very justification for the suit itself.

The bulk of the Government's arguments are simply irrelevant to issues of this nature. Consequently, petitioners believe that the Court can and should grant the petition on the basis of the submissions of the parties as they now stand. However, in view of the critical importance of immediate review in this case and out of an abundance of caution lest the Court be misled by the Government's approach, petitioners will deal with each of the Government's principal lines of argument in this reply.

I. REVIEW OF THE ISSUES PRESENTED BY THE PETITION IS AN ENTIRELY PROPER AND PRACTICAL EXERCISE OF THIS COURT'S POWERS AND ONE WHICH, UNDER THE DECISIONS OF THIS COURT, IS NECESSARY IN VIEW OF THE FAILURE OF THE LOWER COURTS TO RESOLVE THOSE ISSUES.

The one thing that emerges with clarity from the Government's opposition to the petition for writ of certiorari is that the jurisdictional issues raised by the complaint in this case have not even been considered, much less resolved, by the courts below. The Government concedes that the district court held only that petitioners do not enjoy a "*blanket immunity* from *all* violations of the antitrust laws which they *might* commit in the fields of communications services and equipment" (Opposition, pp. 10-11) (emphasis supplied). At the same time, the Government admits that the complaint in this case does not present such an issue, for the complaint "focuses upon *specific* areas of al-

leged misconduct" (*id.*, p. 13 n.18) (emphasis supplied). The four "specific areas of alleged misconduct" involved in this case are succinctly set forth in the Government's opposition as follows (*id.*, p. 4):

> "The complaint alleged that the defendants and co-conspirators had violated Section 2 [1] by obstructing the interconnection of other communications common carriers with AT&T, [2] by obstructing the interconnection of customer-provided terminal equipment with the Bell system, [3] by refusing to sell terminal equipment to Bell subscribers and [4] by restricting AT&T purchases of telecommunications equipment requirements to Western Electric."

Petitioners submit that it is plain from the Government's own description of its complaint that this case has nothing whatever to do with "blanket immunity." Petitioners have not claimed, are not claiming and need not claim "that they have an implied, blanket immunity from *all* violations of the antitrust laws which they *might* commit (Opposition, p. 10) (emphasis supplied). Quite the contrary, their claim has been and continues to be nothing more nor less than that they are entitled to antitrust immunity with respect to the violations *actually* alleged by the Government in this case. Specifically, petitioners claim that an antitrust complaint against a pervasively regulated telecommunications common carrier enterprise cannot properly be predicated upon the terms and conditions under which that enterprise has offered telecommunications equipment to the public as a part of its service, upon its interconnection tariffs, either with respect to equipment or with respect to other common carrier systems, or upon the intra-enterprise relationships through which it assures itself of the availability of the facilities and equipment necessary to discharge its statutory obligation to provide service. Since the district court concerned itself with the hypothetical claim of "blanket immunity" and ignored the concrete issues actually raised by the complaint, none of these claims was considered below—and the Government does not even suggest otherwise.

Instead, even while implicitly recognizing that the district court did not undertake to resolve the issues actually before it, the Government urges this Court to deny review at this time on the theory that the responsibility for such resolution is that of the district court (Opposition, p. 13, n.18), and that it would be "improper" and "impractical" for "this Court to undertake the district court's function" (*id.*, p. 14). With all due respect, this position seems to petitioners to be irresponsible. Given the unparalleled nature of the burdens in this case—not only upon defendants, but upon the Government as plaintiff, upon other companies in the telecommunications industry that will necessarily become involved in the discovery in the case, upon the courts and upon the general public--the need for a prompt resolution of the fundamental jurisdictional issues involved is clear. Although petitioners are in full agreement with the Government that the initial responsibility for the resolution of such issues was that of the district court, the plain fact is that it failed to discharge that responsibility.[1] Given that fact,

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[1] Moreover, the Government was at least partly to blame for the district court's failure to resolve the issues actually before it, since, as pointed out in the petition (pp. 9-11), the Government repeatedly changed its position in that court and deliberately sought to create the impression that only a holding of blanket immunity would justify dismissal of any part of its complaint.

and the totally unacceptable consequences of further delay in the resolution of such fundamental issues, this Court can and should exercise its powers to make certain that those issues are resolved immediately.

Certainly, the Government's contention that immediate resolution by this Court would be "improper" and "impractical" is unsound. The only argument offered in support of this contention by the Government is that "there has been little discovery in this case" (Opposition, p. 5) and hence the Court is faced with a largely "undeveloped record" (*id.*, p. 14). The Government does not explain, however, how discovery could be in any way helpful to the resolution of the fundamental jurisdictional issues raised by the four specific charges in its complaint. Indeed, at no time in the lengthy proceedings on the jurisdictional issue in the district court, in the court of appeals, or in this Court has the Government ever attempted to identify a single fact relevant to the issues presented here as to which further discovery would be useful. In these circumstances, the Government's vague suggestion that the record in this case is somehow inadequate for the immediate resolution of the jurisdictional issues seems like nothing more than a deliberate effort to delay a decision on those issues.

There is no need or justification for such delay. The record in this case is more than adequate to dispose of the jurisdictional issues with respect to each of the four specific areas of alleged misconduct involved in the Government's complaint. Thus, the record shows that each of the Government's charges relates to a matter that is unquestionably subject to common carrier regulation imposed by Title II of the Communications Act and complementary state regu-

latory statutes.[2] It is equally apparent that the nature of the regulation to which those matters are subject is inherently repugnant to the unidimensional standard of competition embodied in the antitrust laws. Finally, it can hardly be questioned that the powers conferred upon the regulatory agencies by these statutes have been vigorously exercised with respect to each and every charge embodied in the Government's complaint. Indeed, the Government's own opposition reveals this fact, for the description of the charges in the complaint which it presents in opposition to the petition is embellished with citations to numerous decisions of the FCC which the Government candidly concedes involve the very matters embraced within its charges in this case (Opposition, pp. 6-10). The Government's unsupported assertion that additional discovery is somehow

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[2] Although the Government suggests that petitioners' claims of antitrust immunity somehow present a different problem insofar as they depend on the existence of state regulatory statutes (Opposition, p. 21), this is clearly not so. Under the Communications Act, state regulation stands on the same footing as federal regulation insofar as the inapplicability of the antitrust laws to pervasively regulated matters is concerned because state regulation, which generally establishes the same kind of pervasive scheme as Title II of the Communications Act, is a part of the federal policy established by that Act. See 47 U.S.C. §§ 152(b)(1), 153(e)(3), 221(b), and 410(a). Thus, in the few instances where the FCC is excluded from jurisdiction over interstate services, Congress made it clear that this exclusion was dependent upon the existence of state regulation, which Congress regarded as functionally equivalent from the standpoint of effectuating its policies. See 47 U.S.C. §§ 153(e)(3) and 221(b). Consequently, the applicability of the antitrust laws to the pervasively regulated activities of telecommunications common carriers must be tested by the same standards, whether such regulation is directly the responsibility of state or federal agencies, and the cases in the telecommunications industry involving state public utility regulation have followed this reasoning. See, *e.g.*, *Mobilfone* v. *Commonwealth Telephone Co.*, 428 F. Supp. 131 (E.D. Pa. 1977).

necessary before the jurisdictional issues in this case can be resolved is thus flatly contradicted by the undisputed facts that are before this Court.

In these circumstances, resolution of the jurisdictional issues before discovery or trial is not only proper and practical but is also affirmatively required by the decisions of this Court. In *Gordon* v. *New York Stock Exchange, Inc.*, 422 U.S. 659 (1975), for example, the Court rejected a similar contention, advanced in that case by the Government as *amicus curiae*, that resolution of a potential conflict between the antitrust laws and a regulatory statute could be resolved only on the basis of a full factual record (*id.* at 686, 688):

> "The United States, as *amicus curiae*, suggests not only that the immunity issue is ultimately for the courts to decide, but also that the courts may reach the decision only on a full record. . . . We disagree. . . .
>
> * * * * *
>
> "We believe that the United States, as *amicus*, has confused two questions. On the one hand, there is a factual question as to whether fixed commission rates are actually necessary to the operation of the exchanges as contemplated under the Securities Exchange Act. On the other hand, there is a legal question as to whether allowance of an antitrust suit would conflict with the operation of the regulatory scheme which specifically authorizes the SEC to oversee the fixing of commission rates. The factual question is not before us in this case. Rather, we are concerned with whether antitrust immunity, as a matter of law, must be implied in order to permit the Exchange Act to function as envisioned by the Congress. The issue of the wisdom of fixed rates becomes relevant only when it is determined that there is no antitrust immunity."

The *Gordon* decision thus recognizes the enormous burdens of antitrust litigation and sets forth a practical rule that potential conflicts between the antitrust laws and regulatory statutes should be resolved at the earliest practical moment. This is precisely the rule for which petitioners contend in this case where the unprecedented burdens involved cry out for such a practical approach.

The fact that this is a Government civil antitrust suit while *Gordon* was a private, treble-damage action does not in any way undercut the applicability of the *Gordon* rule here. Indeed, on the same day this Court decided *Gordon*, it applied the same rule in affirming the dismissal of the Government's complaint in *United States* v. *National Association of Securities Dealers, Inc.*, 422 U.S. 694 (1975). In that case, the Government was contending, just as it contended in *Gordon*, that a full factual record was necessary to the resolution of the immunity issue created by the potential conflict between the antitrust laws and a scheme of regulation (Brief for the United States in *United States* v. *National Ass'n of Securities Dealers, Inc.*, pp. 16-17). The Court rejected this contention in *NASD*, just as it had in *Gordon*, and thus made it plain that the practical rule requiring a threshold determination of such issues wherever practical is equally applicable to Government civil antitrust suits.

The appropriateness of resolving the fundamental jurisdictional issues arising from Government civil antitrust complaints against regulated companies prior to discovery and trial, as well as the appropriateness of immediate judicial review of such threshold jurisdictional determinations, is also strongly confirmed by the decisions of this Court in *United States Alkali Export*

Association v. *United States,* 325 U.S. 196 (1945), and *Far East Conference* v. *United States,* 342 U.S. 570 (1952). In each of those cases, this Court exercised its power to review by writ of certiorari under the All Writs Act an interlocutory order denying a motion to dismiss a civil antitrust complaint brought by the United States. These decisions establish that review under the All Writs Act is appropriate where, as in the present case, the question presented goes to the jurisdiction of a district court to entertain an antitrust complaint with respect to matters subject to regulation by a federal agency; where, as here, review by appeal is foreclosed by the Expediting Act; and where, as here, a failure to review the decision below prior to final judgment would result in serious hardship from protracted and potentially unnecessary litigation that might frustrate the congressional policy embodied in the regulatory scheme.

The Government does not even mention *United States Alkali* and *Far East Conference* in its opposition; nor does it discuss those aspects of *Gordon* and *NASD* which rejected the contention that issues going to the very propriety of the assertion of antitrust jurisdiction ought to be deferred until after discovery or trial. Instead, the Government relies upon what it refers to as "the well-established policy against interlocutory review in government civil antitrust cases" (Opposition, p. 12) and urges the Court to deny certiorari on the theory that a grant of the petition would involve "piecemeal review of interlocutory decisions" (*id.*).

Petitioners submit that there is no "well-established policy" of the kind to which the Government refers and that, in any event, the grant of the petition for certiorari here has nothing whatever to do with "piece-

meal review." While it is doubtless true that mere procedural rulings in a government civil antitrust case should not be reviewed except in unusual circumstances, *United States Alkali* and *Far East Conference* hold that where review is sought on an issue that may completely dispose of the case, different considerations are present. The review of such an issue does not involve a "piecemeal" approach to a government civil antitrust case but, instead, reflects a common sense recognition that where there is a serious question as to the jurisdiction of an antitrust court to entertain a Government civil antitrust complaint at all, that question ought to be resolved before the case proceeds, notwithstanding any general policy against interlocutory review.

That is precisely what is involved in the issues presented in the petition here, and that is all that is involved. Hence, every consideration of justice, reason, and common sense requires that the petition here be granted, for, as was the case in *United States Alkali* and *Far East Conference,* there is simply no other way in which these issues can be resolved in a fashion sufficiently timely to prevent a wholly senseless waste of the resources of the parties, numerous non-parties, and the public and a serious disruption of the statutory scheme under which telecommunications common carriers are regulated. Since the district court and the court of appeals refused to resolve the fundamental jurisdictional issues, the responsibility clearly falls upon this Court to grant review and either itself to resolve those issues or to direct the lower courts to do so.

Moreover, in this case there is an important additional factor which makes immediate review by this Court even more imperative than it was in *United States Alkali* and *Far East Conference.* In its decision

below the district court applied a demonstrably erroneous standard in passing on the implied immunity question—an error which, unless corrected at this time, will make it impossible for the district court ever properly to resolve the jurisdictional issues with respect to the four specific areas of alleged misconduct involved in the Government's complaint. As pointed out in the petition (pp. 11-12), the district court viewed the decisions of this Court in *Otter Tail Power Co.* v. *United States,* 410 U.S. 366 (1973), and *United States* v. *Radio Corp. of America,* 358 U.S. 334 (1959), as controlling on the jurisdictional issues presented by the complaint in this case, even though in both of those cases this Court upheld the assertion of antitrust jurisdiction because—and only because—a pervasive scheme of common carrier regulation of the sort involved in this case was *not* applicable to the conduct challenged in those cases. The Government does not deny that *Otter Tail Power* and *RCA* involved no need to accommodate the antitrust laws to a pervasive scheme of common carrier regulation; nor does it deny that this Court relied upon the absence of such a scheme in reaching its decisions in those cases. Yet it attempts simply to gloss over the fact that the district court completely ignored this distinction.

The Government's approach is an invitation to disaster. Since the district court is proceeding under an erroneous legal standard, reliance upon that court to resolve the fundamental jurisdictional issues presented here can only result in a futile waste of the resources of both the parties and the courts, for the district court will never properly resolve the fundamental jurisdictional issues raised by the specific charges in the Government's complaint—either before or after discovery—so long as it adheres to the views set forth in its

opinion. If reliance is to be placed upon the district court, this Court must correct that court's erroneous view of the law; and to do so, it must grant the petition in this case.

Indeed, it should be plain that immediate review by this Court is the only way in which rationality can be injected into these proceedings. Such action will not amount to an undertaking of "the district court's function"; it will, instead, fulfill this Court's own obligation to make certain that the district courts confine themselves to their proper areas of jurisdiction and correctly discharge their own functions within those areas. As noted above, the Court can do so by granting the petition for certiorari in this case and either resolving the issues presented itself or directing the lower courts to do so in light of the clear standards of this Court's previous decisions. Both of these alternatives are plainly proper and both are practical. Petitioners urgently request that the Court adopt one of them.

II. IMMEDIATE REVIEW IS NECESSARY TO PREVENT THE ASSERTION OF ANTITRUST JURISDICTION OVER MATTERS THAT ARE PROPERLY WITHIN THE EXCLUSIVE JURISDICTION OF REGULATORY AGENCIES.

The Government apparently recognizes the inherent weakness of its contention that this Court should not concern itself with the failure of the courts below to resolve the fundamental jurisdictional issues presented by the petition. Thus, even while conceding that the district court did not resolve the jurisdictional issues that actually were presented by the Government's complaint, the Government seeks at length to defend the district court's assertion of jurisdiction over that com-

plaint on its merits. However, this effort to supply an after-the-fact justification for the district court's action is no sounder than the Government's previous efforts to convince the Court that such action should not be reviewed. Indeed, the Government's discussion of the merits of the district court's assertion of jurisdiction only reinforces and confirms petitioners' showing that there is not the slightest tenable basis for the assertion of antitrust jurisdiction over the matters encompassed within the Government's complaint.

As already pointed out, the Government's contention, advanced at length in its discussion of the merits of the issues presented here (Opposition, pp. 14-18), that petitioners are not entitled to a blanket immunity from the antitrust laws is simply beside the point. Petitioners have never contended that they are entitled to a blanket immunity from the antitrust laws; nor, in view of the Government's statement that its complaint "focuses upon specific areas of alleged misconduct," can there be any serious contention that such immunity is necessary to justify complete dismissal of the complaint in this case. Hence, the Government's extended reliance upon Section 221(a) as precluding a claim of blanket immunity, in addition to being demonstrably erroneous on other grounds,[3] can and should be disregarded as directed at a strawman.

[3] The Government argues that the express immunity provision of Section 221(a) would be a " 'mere redundancy' if Congress had intended to confer a blanket immunity on communication carriers" (Opposition, p. 16) (citation omitted). Aside from the irrelevancy of the whole concept of blanket immunity here, this argument is demonstrably inconsistent with a long line of decisions of this Court involving common carrier regulation going back to *Keogh*

The Government's reliance (Opposition, pp. 16-17) on Section 11 of the Clayton Act (15 U.S.C. § 21) in this connection is also clearly misplaced. On its face, Section 11 gives authority to the FCC to enforce the Clayton Act only "where applicable" to telecommunications common carriers. The "where applicable" limitation shows that Congress was mindful of the inherent conflict in applying two different statutory standards to regulated activities and specifically framed Section 11 so as to permit application of the public interest standard to regulated matters and the application of the Clayton Act only to the unregulated activities of the carriers. This is precisely the way in which Section 11 of the Clayton Act has been interpreted. Thus, in *Satellite Business Systems,* 62 F.C.C.2d 997, 1073 (1977), the FCC held that, notwithstanding Section 11, only the public interest standard of the Communications Act can be applied to matters subject to its pervasive regulatory jurisdiction. In these circumstances, the Government's further quotation (p. 17) of a portion of Section 11(e) of the Clayton Act, which deals only with orders issued under Section 11, as if it ap-

v. *Chicago & North Western R. Co.,* 260 U.S. 156 (1922). The argument that the existence of an express exemption in a regulatory statute precludes a finding of any implied immunity based upon the other provisions of the statute was repudiated by this Court with respect to the Federal Aviation Act in *Pan American World Airways, Inc.* v. *United States,* 371 U.S. 296 (1963), and *Hughes Tool Co.* v. *Trans World Airlines, Inc.,* 409 U.S. 363 (1973), and it has been repudiated by several lower courts with specific reference to the Communications Act. See, *e.g., International Tel. & Tel. Co.* v. *General Tel. & Elec. Corp.,* 518 F.2d 913, 918-19 (9th Cir. 1975); *Phonetele, Inc.* v. *American Tel. & Tel. Co.,* 435 F. Supp. 207, 210 n.3 (C.D. Cal. 1977).

plied to orders of the FCC under the Communications Act, represents a serious distortion of the statute.[4]

The plain fact is that no one—neither the Government nor the FCC—has seriously suggested that regulation is irrelevant to the conduct of telecommunications common carriers under Title II of the Communications Act and complementary state regulatory statutes. Indeed, the Government expressly concedes that its complaint should be dismissed if specific conflicts between antitrust and regulatory jurisdiction are found with respect to its four specific charges (Oppo-

[4] The Government's contention that antitrust immunity is not available under the Communications Act by reason of the saving clause embodied in Section 414 of the Act (47 U.S.C. § 414), which provides that the Act does not abridge or alter existing common law or statutory remedies (Opposition, p. 17), is also demonstrably unsound. Such saving clauses have uniformly been held to preserve only remedies that are *consistent* with the regulatory scheme. Thus, in *Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907), this Court held that Section 22 of the Interstate Commerce Act, from which Section 414 of the Communications Act was derived verbatim, preserved only those remedies that were consistent with the regulatory statute and that inconsistent remedies were impliedly repealed (*id.* at 446-47):

> "This clause . . . cannot in reason be construed as continuing in shippers a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself."

Since this Court has consistently held that the application of the antitrust laws to matters central to a pervasive scheme of common carrier regulation such as that applicable to the matters involved in this case is inherently inconsistent with such regulation, Section 414 does not, and cannot, apply to the matters involved here. Moreover, the fact that the saving clause in Section 414 does not negate the existence of an implied immunity from the antitrust laws where such immunity is necessary to avoid the imposition of conflicting standards is conclusively demonstrated by the fact that in every one of this Court's decisions upholding a claim of implied immunity resulting from pervasive common carrier regulation, immunity was implied despite the presence of a saving clause substantially identical to Section 414. See *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296, 321 (1963) (rejecting argument based upon 49 U.S.C. § 1506); *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363, 410 (1973) (same); *Terminal Warehouse Co.* v. *Pennsylvania R. Co.*, 297 U.S. 500 (1936) (implying immunity despite 49 U.S.C. § 22); *Keogh* v. *Chicago & North Western R. Co.*, 260 U.S. 156 (1922) (same).

sition, p. 22) and that, even if such conflicts are not found with respect to all of the charges, the district court should dismiss any charge that does present such a conflict (*id.*, p. 13 n. 18). The issues presented in the petition relate directly to these concessions and, in petitioners' judgment, can and should be resolved on the very ground suggested by the Government. For the petition clearly shows that there is a conflict between antitrust and regulatory jurisdiction with respect to each of the Government's charges and nothing in the Government's opposition rebuts that showing.

The Government's effort to predicate a violation of the antitrust laws upon the fact that the Bell System's tariffs do not provide for the sale of terminal equipment illustrates the conflict between the antitrust laws and regulatory statutes with respect to the charges involved here. Although the Government is literally correct in its assertion (Opposition, p. 23) that the Communications Act itself does not prohibit telephone companies from selling terminal equipment, the whole structure of the Act is inconsistent with any effort to impose an antitrust duty upon telecommunications common carriers to engage in such sales. Thus, the Act imposes a direct obligation upon the carriers to provide

telecommunications service "including all instrumentalities, facilities [and] apparatus . . . incidental to" such service (47 U.S.C. §§ 153, 201) and expressly requires each carrier "to provide *itself* with adequate facilities for the expeditious and efficient performance of its service" (47 U.S.C. § 214(d)) (emphasis supplied).[5] Since the clear statutory responsibility of telecommunications common carriers is to provide end-to-end service, the Communications Act necessarily envisions that such carriers are entitled to maintain control over the facilities and instrumentalities necessary to perform their statutory obligations.

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[5] In light of these statutory provisions, the Government's characterization of the duty of telecommunications common carriers to provide end-to-end service as "self-appointed" (Opposition, p. 24) is simply incomprehensible. Indeed, this characterization not only collides directly with the definition of the duties of telecommunications common carriers as set forth in the regulatory statutes, but also ignores both the numerous decisions of state regulatory agencies which enforced the carriers' end-to-end service responsibilities (Petition, pp. 30-32) and the FCC's own recognition of the end-to-end nature of the carriers' service responsibilities in *Interstate and Foreign MTS and WATS*, 35 F.C.C.2d 539 (1972):

> "The interstate (and foreign) MTS [message telephone service] and WATS [wide area telephone service] offerings of the telephone companies have historically consisted of the furnishing of facilities, including the telephone hand set, for the public to make interstate or foreign telephone calls between telephones provided by the telephone companies. Thus MTS and WATS services have been and are now offered only as complete services that include the furnishing of the telephone instrument (with certain exceptions applicable, for example, to military installations and remote and hazardous locations). Any changes in the MTS and WATS offerings whereby the telephone company would offer to provide, at the option of the customer, only a portion of such MTS and WATS services and the customer would provide the rest, would constitute a basic and substantial change in the nature of these classifications of services."

Moreover, both the Communications Act and the complementary state statutes regulating telecommunications common carriers confer upon the regulatory agencies the ultimate power to determine the terms and conditions under which any telecommunications service, and any equipment used or useful in connection with that service, may be offered to the public (47 U.S.C. § 205). Under these statutes, there can be little question that the regulatory agencies have been given the authority, upon appropriate findings under the public interest standard, either to prohibit or to require the sale of terminal equipment in accordance with their view as to which of the approaches would best serve the public interest in providing high quality telecommunications service at reasonable rates. As pointed out in the petition (pp. 30-32), this authority was actively exercised by regulatory agencies for many years generally to prohibit the sale of terminal equipment by common carriers for use in connection with regulated telecommunications services and to require that only carrier-owned, installed, and maintained equipment could be interconnected to the nationwide telecommunications network. In recent years some regulatory agencies, notably the FCC, have receded from this policy, and the interconnection of customer-owned equipment is now permitted under certain prescribed conditions. However, no regulatory agency has suggested that the public interest would be served if the Bell System sold terminal equipment.[6]

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[6] As pointed out in the petition (p. 31 n.17), the inclusion of telephone terminal equipment as an integral part of a regulated, end-to-end telecommunications service completely distinguishes this case from the situation involved in *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976), in which the regulation extended only to the

In these circumstances, the charge that petitioners have violated the antitrust laws by not selling terminal equipment not only collides directly with the whole structure of the Communications Act and state regulatory statutes defining the responsibilities of telecommunications common carriers to provide end-to-end service, but would seriously invade the authority of the regulatory agencies to discharge their responsibilities under those statutes. A plainer repugnancy between the assertion of antitrust jurisdiction and the regulatory scheme applicable to the provision of telecommunications common carrier services can scarcely be imagined.

The Government's attempt to apply the antitrust laws to the interconnection of customer-provided equipment is also demonstrably repugnant to the regulatory scheme. The Communications Act and state regulatory statutes confer plenary authority over the interconnection of equipment to the nationwide telecommunications network upon the FCC and state regulatory agencies. Contrary to the Government's contention, these statutes do not in any way guarantee "subscribers' freedom of choice in equipment" (Opposition, p. 24). Rather, the statutes make it clear that the interest of subscribers in using the equipment of their

"distribution of electricity" (*id.* at 585) and made no pretense of regulating the provision of lighting services or any of the electrical appliances plugged onto Detroit Edison's electrical distribution system. The Government does not directly deny that the nature and scope of the regulation involved in this case is entirely different from the regulation in *Cantor* with respect to the very factors which were determinative in that decision, but it attempts to characterize the obligation of telecommunications common carriers in such a way as to suggest that this difference should be ignored (Opposition, p. 24).

choice must be balanced by the appropriate regulatory agencies against other public interest considerations such as the safety, reliability and efficiency of the nationwide telecommunications network.

As pointed out in the petition (pp. 30-32), this balance was struck for several decades by the enforcement of a general prohibition against the interconnection of customer-provided equipment, and the gradual relaxation of that prohibition by the FCC in recent years has in every instance been carefully controlled and monitored. For example, when the FCC decided to permit the interconnection of customer-owned recording devices as a result of conditions which had developed during World War II, the Commission ordered that such interconnection be made only through "adequate connecting arrangements" designed "to protect against impairment of the telephone service . . . [and] harmful voltages or currents" and that "the furnishing, installation, and maintenance of the necessary connecting devices should be the responsibility of the telephone companies." *Use of Recording Devices,* 11 F.C.C. 1033, 1048 (1947). Seven years later, in *Jordaphone Corp.* v. *American Tel. & Tel. Co.,* 18 F.C.C. 644 (1954), the FCC essentially embraced the prohibition on the interconnection of other customer-provided equipment by holding that telephone answering devices could be interconnected to the network only to the extent that such interconnection was permissible under state or local tariffs, thereby continuing and incorporating the prohibition on interconnection of such equipment that had been established in the rulings of state regulatory agencies. And when wider interconnection of customer-provided equipment to the network resulted from the FCC's decision in *Carter-*

fone, 13 F.C.C.2d 420 (1968), a period of unprecedented regulatory activity with respect to interconnection followed [7] which ultimately led to the establishment by the FCC of a comprehensive registration program under which equipment may be connected directly to the network if it has been found by the Commission to comply with an elaborate set of Commission-prescribed technical standards.[8]

The Government largely ignores both this long history of intimate regulatory involvement in every aspect of the interconnection of equipment to the network and the consistent line of decisions by regulatory agencies recognizing that continued regulatory control over interconnection is essential in the public interest. Moreover, the Government also ignores the fact that at least three very recent decisions have squarely held

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[7] See, *e.g., AT&T "Foreign Attachment" Tariff Revisions,* 15 F.C.C.2d 605 (1968), 18 F.C.C.2d 871 (1969); *Interstate and Foreign MTS and WATS,* 35 F.C.C.2d 539 (1972), 53 F.C.C.2d 221 (1975), 56 F.C.C.2d 593 (1975), 58 F.C.C.2d 716, 736 (1976), 59 F.C.C.2d 83 (1976), FCC 76-928 (Oct. 18, 1976), *aff'd sub nom. North Carolina Util. Comm'n* v. *FCC,* 552 F.2d 1036 (4th Cir. 1977), *cert. denied,* —— U.S. —— (Oct. 3, 1977); National Association of Regulatory Utility Commissioners, Committee on Communications, *Report After Investigation* (May 15, 1974). Independent investigations concerning the interconnection of customer-provided terminal equipment were also instituted by at least seventeen different state regulatory agencies.

[8] The regulations for the Commission's registration program (47 C.F.R. §§ 68.1 *et seq.*) comprise 82 pages of procedures and technical specifications or performance criteria that must be met under specified conditions of vibration, temperature and humidity, including standards relating to shock, metallic voltage surge, and longitudinal voltage surge (47 C.F.R. § 68.302), current leakage limitations (47 C.F.R. § 68.304), signal power limitations (47 C.F.R. § 68.306), longitudinal balance limitations (47 C.F.R. § 68.310), on-hook impedance limitations (47 C.F.R. § 68.312), and minimum call duration requirements (47 C.F.R. § 68.314).

that the regulation of all aspects of the interconnection of terminal equipment to the nationwide telecommunications network under the regulatory public interest standard is plainly repugnant to the simultaneous application of the antitrust laws. *Phonetele, Inc.* v. *American Tel. & Tel. Co.,* 435 F.Supp. 207 (C.D. Cal. 1977); *Dasa Corp.* v. *General Telephone Co. of California,* 1977-2 Trade Cases ¶ 61,610 (C.D. Cal. 1977); *Western Electric Co.* v. *Milgo Electronic Corp.,* Case No. 74-1601-Civ-CA (S.D. Fla., Sept. 20, 1976), *appeal pending,* No. 76-4079 (5th Cir.). These decisions, which apply the very principle for which petitioners here contend, reflect a recognition of the proper role of regulation in the interconnection of customer-provided equipment that totally discredits the view advocated by the Government.[9]

The regulatory scheme applicable to the tariffs of the Bell System that deal with interconnection of other carrier systems is also plainly repugnant to the application of the antitrust laws. As pointed out in the petition (pp. 33-34), Section 201(a) of the Communications Act makes clear that the duty of carriers "to establish physical connections with other carriers" exists only "in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or de-

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[9] Ironically, in one of its own submissions to the FCC in the *Registration* proceedings, the Antitrust Division of the Department of Justice recognized the crucial importance of considerations other than competition in the formulation of interconnection policy (Reply Comments of Department of Justice, dated January 16, 1974, at 23):

> "We do not suggest, and no responsible party would, that the Commission should ignore the problems of network safety and efficiency. . . ."

sirable in the public interest." In attempting to support its charge that an antitrust violation can be predicated upon the failure of petitioners to provide some interconnections *before* hearing and order of the FCC, the Government completely distorts the language of Section 201(a), characterizing that section as one that merely "*empowers the Commission* to order one carrier to interconnect with another where the public interest would be served thereby" (Opposition, p. 25) (emphasis supplied). The language of the section, however, deals, not with the powers of the Commission, but with the *duties of common carriers,* and the section expressly defines those duties to include a duty of interconnection only "where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest."

The Government's effort to impose upon common carriers a duty to interconnect with other common carrier systems directly contrary to that defined in Section 201(a) graphically illustrates the conflict with regulation that is inherent in the Government's entire complaint. The Government's position would effectively eliminate the provisions of the Communications Act defining the carrier's obligations, and thus would impair the authority to regulate, for the public interest standard under which regulatory agencies are obligated to consider requests for interconnection may be, and frequently is, inconsistent with any antitrust obligation of unrestricted interconnection.[10]

[10] As the Court of Appeals for the District of Columbia recently pointed out, the Commission recognized in its *Specialized Common Carrier* decision that interconnection by general service carriers with specialized carriers inevitably involves "a certain amount of 'cream-skimming'." *American Tel. & Tel. Co.* v. *FCC,* 539 F.2d 767, 774 (D.C. Cir. 1976), *aff'g United States Transmission Systems, Inc.,* 48 F.C.C.2d 859 (1974). Since such "cream-skimming" has effects upon the general service carriers that may be contrary to the public interest, it must be controlled through careful "monitoring," and the court of appeals pointed out that the FCC itself recognized this fact (539 F.2d at 774). The position of the Government simply ignores the responsibility of the FCC to monitor such "cream-skimming" and, in fact, would deprive it of the power to do so. In this respect, the Government's position is flatly inconsistent with this Court's holding in *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Comm'n,* 341 U.S. 329, 334 (1951).

The Government's contention that the application of the antitrust laws to telephone company equipment purchasing policies "would not *necessarily* interfere with the regulatory scheme" (Opposition, p. 28) (emphasis supplied) on its face falls short of the finding, required by the decisions of this Court, that regulated conduct will not be subjected to inconsistent standards if the antitrust laws are applied. The Government concedes that the regulatory agencies have the power effectively to control both the prices paid by petitioners for equipment and the rate of return earned by Western Electric and Bell Laboratories (Opposition, pp. 26-27), and further concedes that in a recent proceeding the FCC has actively asserted its authority over petitioners' equipment purchase decisions and "ordered AT&T to change its equipment purchase decision-making system" (Opposition, p. 27 n.31).[11] As a result of this close regulatory supervision, the purchasing practices of the Bell System are significantly different from those that would have resulted

[11] The Government makes frequent reference to this proceeding (*AT&T Charges for Interstate Telephone Service,* 64 F.C.C.2d 1 (1977)), to suggest that the FCC condemns the Bell System's vertically integrated structure and its practice of purchasing substan-

under competitive conditions. Nevertheless, the Government argues that the antitrust laws can be applied to petitioners' equipment purchasing practices because petitioners could comply with the statutory duties imposed upon them by the Communications Act and yet follow practices which are still more favorable to the promotion of competition (Opposition, p. 27).

This contention again reveals the unsoundness of the Government's position in this case. Although the matters challenged here are all committed to pervasive regulation by administrative agencies acting under a public interest standard, the Government would superimpose the competition standard of the antitrust laws

tial amounts of its equipment requirements from Western Electric (Opposition, pp. 8, 27). This is a complete mischaracterization of the FCC's decision which in fact concluded (64 F.C.C.2d at 10):

> "[W]e find the overall performance of the Bell System has been, and continues to be excellent, generally providing high quality telephone service at reasonable rates. . ."

and that (*id.* at 23):

> "Western has high quality management and has generally performed efficiently overall, thereby benefitting telephone ratepayers."

The Government is also in clear conflict with the FCC when it asserts that the FCC has no regulatory authority over Western Electric and Bell Labs, for the FCC has unequivocally stated that it has substantial regulatory authority over the entire vertically-integrated Bell System structure (*id.* at 12-13):

> "[T]he statutory scheme of the Communications Act, in particular, Sections 1, 4(i), 4(j), 303, 403 and Title II generally (especially Sections 201-05 and 217-220) require us to ensure that adequate service and reasonable rates and regulations result from the vertically-integrated Bell System structure."

The FCC has also asserted authority "to take independent regulatory action" with respect to Bell-Western dealings (*id.* at 14), and over "fundamental Bell System policies, regulations and practices which govern the relationships and joint activities of the Bell System entities" (*id.* at 12).

upon these matters, thereby wholly depriving the regulatory agencies of the discretion conferred upon them by statute to develop policies other than those which are the least anticompetitive.[12] This approach is plainly repugnant to the regulatory scheme established by Congress for telecommunications common carriers, for it would unquestionably prevent that scheme from functioning in the manner intended by Congress (see Petition, pp. 18-20).

Thus, the requirements of this Court's decisions in *Gordon* v. *New York Stock Exchange, Inc.*, 422 U.S. 659 (1975), and *United States* v. *National Association of Securities Dealers, Inc.*, 422 U.S. 694 (1975). are fully satisfied with respect to each of the charges set out in the Government's complaint. As pointed out in the petition (pp. 24-25), these decisions require the recognition of antitrust immunity with respect to matters actively regulated under a standard different from, and inconsistent with, the unidimensional competition standard of the antitrust laws, and the Government does not seriously contend otherwise. Indeed, the Government concedes that *Gordon* holds that antitrust immunity must be implied whenever a regulatory statute embodying a standard different from competition "contemplate[s]" that the companies subject to such

[12] The least restrictive alternative approach which the Government seeks to impose on the FCC was specifically rejected by the Court of Appeals for the District of Columbia Circuit in *Home Box Office, Inc.* v. *FCC*, —— F.2d ——, ——, 40 R.R.2d 283, 322 n.67 (D.C. Cir. 1977):

> "We do not agree with the suggestion of some petitioners that the Commission must demonstrate that the means it has chosen have the least impact on competition consistent with achievement of the Commission's purposes."

regulation may engage in conduct of the kind challenged in an antitrust suit. (Opposition, p. 20 n.23). Since each of the charges in this case relates to conduct in which the Communications Act and complementary state regulatory statutes clearly contemplate that telecommunications common carriers may engage, the challenged conduct is immune from the antitrust laws even under the Government's view of *Gordon*. Indeed, the situation here is even more compelling, since much of the conduct challenged by the Government has been required or actively encouraged by the responsible regulatory agencies.

Moreover, as pointed out in the petition (pp. 25-26), the claim of antitrust immunity involved here is supported by a consistent line of decisions of this Court holding that matters at the heart of a pervasive scheme of common carrier regulation are immune from the antitrust laws. *Keogh* v. *Chicago & North Western R. Co.*, 260 U.S. 156 (1922); *Terminal Warehouse Co.* v. *Pennsylvania R. Co.*, 297 U.S. 500 (1936); *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296 (1963); *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363 (1973). One could hardly imagine charges more directly related to the heart of a scheme of common carrier regulation than those advanced in the Government's complaint in this case. Yet, the Government does not even attempt to deal with petitioners' analysis of the decisions of this Court or with their demonstration that these decisions can only be rationalized by recognition of this principle.[13]

[13] The Government purports to find some exceptions to the principle that matters central to a pervasive scheme of common carrier regulation are immune from the antitrust laws in a few lower court decisions (Opposition, p. 15 nn. 19, 20), but the cases cited by the Government are all either ancient decisions involving telephone companies which were decided long before the telephone industry was subjected by Congress to pervasive regulatory controls or cases which have no factual similarity to this case. More importantly, however, the Government completely ignores a consistent line of recent lower court decisions which hold that pervasively regulated conduct of telecommunications common carriers—including some of the very conduct alleged by the Government in this case—is impliedly immune from the application of the antitrust laws because those laws are plainly repugnant to such regulation. See *Phonetele, Inc.* v. *American Tel. & Tel. Co.*, 435 F. Supp. 207 (C.D. Cal. 1977); *Dasa Corp.* v. *General Tel. Co. of Cal.*, 1977-2 Trade Cases ¶ 61,610 (C.D. Cal. 1977); *Mobilfone* v. *Commonwealth Tel. Co.*, 428 F. Supp. 131 (E.D. Pa. 1977); *Citizens Utilities Co.* v. *American Tel. & Tel. Co.*, Civil No. 39483-WJF (N.D. Cal., Apr. 1, 1977), *appeal pending*, No. 77-1941 (9th Cir.); *Western Electric Co.* v. *Milgo Electronic Corp.*, No. 74-1601-Civ.-CA (S.D. Fla., Sept. 20, 1976), *appeal pending*, No. 76-4079 (5th Cir.).

Instead, the Government resorts to the tactic, upon which it successfully relied both in the district court and in the court of appeals, of citing and discussing a whole variety of cases dealing with regulatory statutes that do not remotely resemble those involved here, as though those cases involve pervasive schemes of common carrier regulation.[14] However, the Government does not, and cannot, deny that this Court has *never* upheld the assertion of jurisdiction over an antitrust complaint based upon charges related to matters subject to a pervasive scheme of common carrier regulation. Indeed, the Government's only serious discussion of the significance of pervasive common carrier regulation is an attempt to distort the Court's decision in the *Keogh* case—a case in which the Court upheld antitrust im-

[14] The Government also suggests that some of the conduct complained of was subsequently found to be "in violation of the Communications Act and Federal Communications Commission policy" (Opposition, p. 6)—a contention which it nowhere explains or sup-

munity—into a case which supports its position here and a related effort to rewrite the Court's decision in *Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439 (1945) —a case in which the Court upheld the assertion of antitrust jurisdiction only because the matter involved was *not regulated*—to fit the facts of this case. The Government's treatment of *Keogh* is not only strained and demonstrably unsound, but it rests upon a theory which has been expressly repudiated by this Court.[15] And its treatment of *Georgia* v. *Pennsylvania* collides

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ports, but one which, in any event, is irrelevant to the issues presented here. As pointed out in the petition (p. 33 n.20), a violation of a regulatory statute provides no basis for the assertion of antitrust jurisdiction where, as here, the regulatory statute provides a complete "self-contained remedial scheme" for any violations of its provisions. *Terminal Warehouse Co.* v. *Pennsylvania R. Co.*, 297 U.S. 500 (1936). Moreover, Section 401 of the Communications Act (47 U.S.C. § 401) empowers the Attorney General to enforce the provisions of the Act or any order of the Commission in any federal district court. See *United States* v. *Gris*, 247 F.2d 860 (2d Cir. 1957). Hence, if the Antitrust Division is genuinely concerned with enforcing compliance with the Communications Act, it has ample means, independent of the antitrust laws, to accomplish that end.

[15] The Government attempts to avoid the actual holding of *Keogh* by contending that the Court in *Keogh* also "held that the [Interstate Commerce] Act, as amended by the Transportation Act of 1920 . . . , did not bar the United States from enforcing the Sherman Act's injunctive and criminal provisions against carriers" (Opposition, p. 20 n.22). In fact, however, the only holding in *Keogh* was that an antitrust action brought against a carrier in 1914—six years before the enactment of the Transportation Act of 1920—was plainly repugnant to the pre-1920 regulatory controls over carrier rates. The so-called second holding which the Government purports to see in *Keogh* is based upon a tentatively phrased

head-on with the explicit language of the decision in that case.[16]

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and subsequently repudiated *obiter dictum* in the opinion that Commission approval of the rates challenged in *Keogh* "would not, *it seems*, bar proceedings by the government" (260 U.S. at 162) (emphasis supplied)—a dictum which was premised upon the Court's earlier decisions in *United States* v. *Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897), and *United States* v. *Joint Freight Traffic Ass'n*, 171 U.S. 505 (1898), decided long before the Transportation Act of 1920 created a pervasive scheme of regulation for railroads (see Petition, p. 25 n.11). This dictum was directly repudiated in *Far East Conference* v. *United States*, 342 U.S. 570 (1952), in which the Government, relying upon *Keogh*, attempted to distinguish the Court's previous decision in *United States Navigation Co.* v. *Cunard Steamship Co.*, 284 U.S. 474 (1932), on the ground that *Cunard* involved a suit by a private party and was, therefore, not binding in a suit brought by the Government (Brief for the United States in *Far East Conference* v. *United States*, pp. 31, 36, 38). This Court rejected this distinction and the *Keogh* dictum, holding that the antitrust immunity which flows from pervasive regulation is fully applicable to suits brought by the Government (342 U.S. at 576):

> "The sole distinction between the *Cunard* case and this is that there a private shipper invoked the Antitrust Acts and here it is the Government. This difference does not touch the factors that determined the *Cunard* case. . . . The same Antitrust Laws and the same Shipping Act apply to the same dual rate system. To the same extent they define the appropriate orbits of action as between the court and the Maritime Board."

[16] The Government attempts to brush aside the circumstances pointed out in the petition (pp. 26-27) which led to the decision in *Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439 (1945), by arguing that the deliberate refusal of Congress on two separate occasions to subject railroad rate bureaus to ICC regulation was mentioned by the Court "only in passing" and was "not central to the holding" of that case (Opposition, p. 19 n.22). This contention is flatly contradicted by the opinion of this Court (324 U.S. at 457):

> "Twice Congress has been tendered proposals to legalize rate-fixing combinations. But it has not adopted them. ***In view of this history*** we can ***only*** conclude that they have no immunity from the anti-trust laws." (Emphasis supplied.)

The plain fact is that there is no authority that supports the Government's position in this case. Matters subject to regulation under a standard different from and inconsistent with the unidimensional competition standard of the antitrust laws, and matters lying at the heart of a pervasive scheme of common carrier regulation, have consistently been recognized to be immune from the antitrust laws. Thus, what the Government really seeks here is not to apply existing legal principles to petitioners' conduct, but to have the courts change those principles so that the antitrust laws can be retroactively applied to conduct for which such laws were never intended.

CONCLUSION

Despite the complexity of the regulatory context out of which it emerges, this case is actually a very simple one. The Communications Act and comparable state regulatory statutes unquestionably place pervasive regulatory controls upon petitioners, including controls over the kinds and the quality of the equipment and services they offer, their right and obligation to provide service to any particular class of customers, their relationships with other companies in the industry, their rates, and their profits. Every decision of this Court involving the issue of the applicability of the antitrust laws to regulated industries has recognized that those laws do not apply to matters subject to such pervasive controls. Yet the Government seeks to prosecute an antitrust complaint against petitioners which the proceedings in this case have shown to relate entirely to such matters.

The maintenance of this action cannot possibly serve to further the purposes of the antitrust laws; nor,

indeed, can it serve any genuinely useful or legitimate purpose at all. The district court is being asked to undertake the trial of a huge case involving virtually every activity that has gone on in the telecommunications industry over the past 75-100 years, even though all of these activities are subject to the jurisdiction of regulatory agencies, and have in fact been considered in depth and over a considerable period of time by those agencies. Moreover, the Government would have the courts ignore the fact that the responsible regulatory authorities have developed a series of rules to govern each of the matters involved in this case, which rules are necessarily subject to constant review, reexamination, and refinement by the agencies involved. The antitrust laws were never intended to apply to such matters.

The issues presented by the petition for certiorari, although in petitioners' judgment clear in their proper resolution, are nonetheless critically important. Discovery and trial in this case would impose burdens of incredible magnitude, not only upon the courts and the parties, but also upon the public, which, because of petitioners' regulated status, would inevitably bear the burden of both sides of this litigation. In these circumstances, the proper disposition of this case under the law is clear: the case should be dismissed in its entirety on the ground that all the matters involved herein are

immune from the antitrust laws. This Court should therefore grant the petition for writ of certiorari in order to protect the parties, the courts and the public from an immense and needless waste of resources.

Respectfully submitted,

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PALMER & WOOD
SIDLEY & AUSTIN

November 3, 1977